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In The

# Supreme Court of the United States

October Term, 1991

KEITH J. HUDSON,

*Petitioner,*

v.

JACK McMILLIAN, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF PETITIONER

ALVIN J. BRONSTEIN*
(Appointed by this Court)
MARK J. LOPEZ
ELIZABETH ALEXANDER
DAVID C. FATHI
MOHAMEDU F. JONES
National Prison Project
of the American Civil
Liberties Union Foundation
1875 Connecticut Ave. N.W.
Suite 410
Washington, D.C. 20009
202/234-4830

JOHN A. POWELL
STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, N.Y. 10036
212/944-9800

*Counsel for Petitioner*

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

498

## QUESTION PRESENTED

1. Whether the court of appeals erred in holding that the Eighth Amendment cannot be violated by the beating of a prisoner by guards unless the beating results in significant injury, when it accepted the trial court's findings that respondents acted with malice, that they did not need to use any force against petitioner, and that the force inflicted unnecessary and wanton pain.

## LIST OF PARTIES

The petitioner, Keith J. Hudson, is a prisoner at the Louisiana State Penitentiary (hereinafter "Angola") in Angola, Louisiana. The respondents are Jack McMillian, Marvin Woods and Arthur Mezo, all correctional security officers at Angola.



## TABLE OF CONTENTS


Page

QUESTION PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

SUMMARY OF THE ARGUMENT ..... 6

ARGUMENT:

I. THERE IS NO BASIS FOR IMPOSING A "SIGNIFICANT INJURY" REQUIREMENT IN EIGHTH AMENDMENT USE OF FORCE CLAIMS ..... 9

A. This Court's Eighth Amendment Decisions Focus on Whether Pain Was Inflicted, Not Whether a Significant Injury Resulted ..... 9

B. Petitioner's Position Is Supported by the History of the Eighth Amendment ..... 18

II. THE HOLDING OF THE COURT OF APPEALS IS INCONSISTENT WITH THE DECISION OF EVERY OTHER COURT OF APPEALS THAT HAS EXPRESSLY CONSIDERED THIS ISSUE .. 26

TABLE OF CONTENTS – Continued

Page

III. AN ISOLATED INCIDENT OF WANTON AND UNNECESSARY INFLICTION OF PAIN IS SUFFICIENT TO STATE AN EIGHTH AMENDMENT CLAIM ..... 34

CONCLUSION ..... 38



TABLE OF AUTHORITIES

Page

CASES:

*Bart v. Telford*, 667 F.2d 622 (7th Cir. 1982) ..... 28

*Bellamy v. McMickens*, 692 F.Supp. 205 (S.D.N.Y. 1988) ..... 32

*Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981) .....29, 30

*Black Spotted Horse v. Else*, 767 F.2d 516 (8th Cir. 1985) ..... 27

*Bonsignore v. City of New York*, 521 F.Supp. 394 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 635 (2d Cir. 1982) .... 34

*Bony v. Brandenburg*, 735 F.Supp. 913 (S.D.Ind. 1990) ..... 33

*Bowman v. Casler*, 622 F.Supp. 836 (N.D.N.Y. 1985) .... 30

*Brooks v. Pembroke City Jail*, 722 F.Supp. 1294 (E.D.N.C. 1989) ..... 33

*Brown v. Hughes*, 894 F.2d 1533 (11th Cir. 1990)..... 29

*Brown v. Triche*, 660 F.Supp. 281 (N.D.Ill. 1987) ..... 32

*Burgin v. Iowa Dept. of Corrections*, 923 F.2d 637 (8th Cir. 1991) ..... 30

*Burris v. Kirkpatrick*, 649 F.Supp. 740 (N.D.Ind. 1986) ..... 32

*Burton v. Livingston*, 791 F.2d 97 (8th Cir. 1986)...29, 30

*Byrd v. Clark*, 783 F.2d 1002 (11th Cir. 1986)..... 30

*Campbell v. Grammer*, 889 F.2d 797 (8th Cir. 1989) .... 30

*Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986)..... 30

*Corselli v. Coughlin*, 842 F.2d 23 (2d Cir. 1988)..... 29

TABLE OF AUTHORITIES – Continued

Page

*Douglas v. Marino*, 684 F.Supp. 395 (D.N.J. 1988)..... 31

*Dudley v. Stubbs*, 109 S.Ct. 1095 (1989) (mem.)..... 10

*Estelle v. Gamble*, 429 U.S. 97 (1976).....7, 9, 11, 12, 35

*Francis v. Pike County, Ohio*, 708 F.Supp. 170 (S.D.Ohio 1988)..... 33

*Franklin v. Aycock*, 795 F.2d 1253 (6th Cir. 1986) ..... 31

*Gassner v. City of Garland, Texas*, 864 F.2d 394 (5th Cir. 1989) ..... 32

*Graham v. Connor*, 109 S.Ct. 1865 (1989) .....15, 16, 17

*Gray v. Spillman*, 925 F.2d 90 (4th Cir. 1991)..... 29

*Gregg v. Georgia*, 428 U.S. 153 (1976) .....9, 20

*Harrison v. Byrd*, 765 F.2d 501 (5th Cir. 1985)..... 31

*H.C. by Hewett v. Jarrard*, 786 F.2d 1080 (11th Cir. 1986)..... 27, 29, 33

*Henson v. Thezan*, 698 F.Supp. 150 (N.D.Ill. 1988) .... 31

*Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223 (5th Cir. 1988) ..... 31

*Holt v. Sarver*, 300 F.Supp. 825 (E.D.Ark. 1969)..... 13

*Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990).....5, 37

*Hutto v. Finney*, 437 U.S. 678 (1978) ..... 12, 13, 22

*Ingraham v. Wright*, 430 U.S. 651 (1977)..... 9

*In re Kemmler*, 136 U.S. 436 (1890)..... 19

*Jackson v. Crews*, 873 F.2d 1105 (8th Cir. 1989)..... 30

*Johnson v. Doherty*, 713 F.Supp. 69 (S.D.N.Y. 1989).... 30



TABLE OF AUTHORITIES – Continued

Page

*Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1972), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973) ..... 13, 14, 27, 28

*Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989).....17, 31

*Jones v. Lockhart*, 484 F.2d 1192 (8th Cir. 1973)..... 35

*King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980) ..... 29

*Lewis v. Lane*, 816 F.2d 1165 (7th Cir. 1987)..... 28

*Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) ..... 19

*Martinez v. Mancusi*, 443 F.2d 921 (2d Cir. 1970)..... 35

*McHenry v. Chadwick*, 896 F.2d 184 (6th Cir. 1990).... 29

*McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986)..... 22

*Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) ..... 15

*Molton v. City of Cleveland*, 839 F.2d 240 (6th Cir. 1988)..... 31

*Norris v. District of Columbia*, 737 F.2d 1148 (D.C. Cir. 1984) ..... 29

*Oliver v. Collins*, 914 F.2d 56 (5th Cir. 1990) ..... 31

*Oses v. Fair*, 739 F.Supp. 707 (D.Mass. 1990)..... 30

*Parker v. Asher*, 701 F.Supp. 192 (D.Nev. 1988)..... 30

*Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986).. 22, 30, 31

*Pressly v. Gregory*, 831 F.2d 514 (4th Cir. 1987)..... 32

*Rhodes v. Chapman*, 452 U.S. 337 (1981).....9, 12

*Robinson v. California*, 370 U.S. 660 (1962)..... 11

TABLE OF AUTHORITIES – Continued

Page

*Simpson v. Saroff*, 741 F.Supp. 1073 (S.D.N.Y. 1990) .... 31

*Smallwood v. Renfro*, 708 F.Supp. 182 (N.D.Ill. 1989) .... 31

*Smith v. Wade*, 461 U.S. 30 (1983) ..... 15

*Stanford v. Kentucky*, 109 S.Ct. 2969 (1989) .....18, 20

*Thomas v. City of New Orleans*, 687 F.2d 80 (5th Cir. 1982)..... 34

*Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974), *cert. denied sub nom. Thomas v. Cannon*, 419 U.S. 879 (1974) ..... 35

*Trop v. Dulles*, 356 U.S. 86 (1958)..... *passim*

*U.S. v. Bigham*, 812 F.2d 943 (5th Cir. 1987).....20, 30

*Velleff v. Cantwell*, 630 F.Supp. 346 (N.D.Ill. 1986) .... 32

*Weems v. United States*, 217 U.S. 349 (1910) ... 11, 19, 20

*White v. Roper*, 901 F.2d 1501 (9th Cir. 1990)..... 32

*Whitley v. Albers*, 475 U.S. 312 (1986)..... *passim*

*Wilkerson v. Utah*, 99 U.S. 130 (1878) ..... 19

*Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989) ..... 30

*Williams v. Blackburn*, 761 F.Supp. 24 (M.D.La. 1991)..... 26

*Williams v. Boles*, 841 F.2d 181 (7th Cir. 1988).....28, 29

*Williams v. Omodt*, 640 F.Supp. 120 (D.Minn. 1986) .... 32

*Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974) ..... 35

*Wilson v. Seiter*, 59 U.S.L.W. 4671 (6/17/91) .....7, 9, 12, 16, 36

*Wisniewski v. Kennard*, 901 F.2d 1276 (5th Cir. 1990) .31, 34



TABLE OF AUTHORITIES – Continued

Page

*Zumbroegel v. City of Dearborn Heights*, 705 F.Supp. 358 (E.D.Mich. 1989)..... 31

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Const.:

Amend. V (Due Process Clause) ..... 29

Amend. VIII (Cruel and Unusual Punishments Clause)..... *passim*

Amend. XIV (Due Process Clause) ..... *passim*

18 U.S.C. §241..... 20

18 U.S.C. §242..... 20

28 U.S.C. §1343.....1, 2

42 U.S.C. §1983.....1, 2

Ala. Code Tit. 14, Sec. 14-11-1 (1975)..... 21

Ariz. Rev. Stat. Ann. Sec. 31-127 (1986) ..... 21

Cal. Penal Code Ann. Tit. 1, Sec. 2652 (Supp. 1982) .... 21

Fla. Stat. Ann. Sec. 944.36 (1985)..... 21

Ga. Code Ann. Sec. 42-5-58 (1989) ..... 21

Idaho Code Ann. Sec. 18-706 (1987)..... 21

Ind. Ann. Stat. Sec. 11-11-54 (1988)..... 21

Kan. Stat. Ann. Sec. 21-3425 (1981)..... 21

Miss. Code Ann. Sec. 47-1-27 (1972)..... 21

Mo. Stat. Ann. Sec. 217-405 (1991) ..... 21

Neb. Rev. Stat. Sec. 83-4, 114 (1987)..... 21

TABLE OF AUTHORITIES – Continued

Page

Nev. Rev. Stat. Ann. Sec. 209.371 (1986-1989) ..... 21

N.D. Code Sec. 12-47-26 (1985) ..... 21

Okla. Stat. Ann. Tit. 57, Sec. 9 (1969) ..... 21

Oreg. Rev. Stat. Ann. Secs. 421.105(2), 421.990(2) (1989) ..... 21

S.D. Code Sec. 24-2-10 (Rev. 1988) ..... 21

Tex. Crim. Proc. Code Ann. Arts. 1.09, 16.21, 43.24 .... 21

Vt. Stat. Ann. Sec. 853 (1986) ..... 21

OTHER AUTHORITIES:

American Correctional Association, *Standards for Adult Correctional Institutions* (3d ed. 1990) ..... 14

Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839 (1969) ..... 18

Haney, Banks and Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 Int'l J. Criminology and Penology 69 (1973) ..... 24

Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 Human Relations 57 (1965) ..... 25

Morris, *The Future of Imprisonment* (1974) ..... 24

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, entered on July 31, 1990, is reported at 929 F.2d 1014 and is reprinted in the Joint Appendix separately filed (hereinafter "App.") at p.30. The unreported trial court opinion is also reprinted in the Joint Appendix. App. at 19.

## JURISDICTION

Petitioner filed this action on December 29, 1983. The district court had jurisdiction of the case pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The trial court conducted a trial on March 10, 1987, and issued an opinion and judgment in favor of the petitioner on April 30, 1987. Respondents filed a notice of appeal on May 26, 1987. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, reversing the trial court, were issued on July 31, 1990. A timely petition for rehearing was denied by the court of appeals on September 4, 1990. The petition for writ of certiorari was filed on November 19, 1990, and the Court granted the petition and the motion for leave to proceed *in forma pauperis* on April 15, 1991. On April 29, 1991, the Court appointed the undersigned as counsel for the petitioner and amended the April 15, 1991 order granting the petition to limit the question under review.

## STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.



## STATEMENT OF THE CASE

This action was filed by the petitioner, a prisoner at the Louisiana State Penitentiary (Angola) acting without counsel,[1] in 1983. The complaint alleged that on October 30, 1983, the petitioner had an exchange of words with respondents and was given two disciplinary reports. He was then placed in handcuffs and shackles "and under full restraint." App. at 6. He was led from his cell by the respondents, correctional officers Woods and McMillian, and thereafter, while Woods held petitioner and hit him in the back, McMillian repeatedly punched him in the face.[2] The complaint also alleged that respondent Mezo, a correctional officer lieutenant, observed the beating and told the other two officers, "[D]on't have to[o] much fun." *Id*. The complaint further stated that petitioner suffered bleeding and swelling about the face and bruises about the body, and was denied medical care. Finally, the complaint sought "compensatory damages . . . for physical, mental, and emotional anguish due to the unjust and unnecessary beating" and asked "that injunctions be placed against the officers directly involved to prohibit further cru[el]ty" to petitioner and other prisoners at Angola. *Id*. at 8.

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[1] Petitioner proceeded *pro se* until the appointment of counsel by this Court on April 29, 1991.

[2] The petitioner was hit nine or ten times by Officer McMillian. Transcript p.80. (References to the trial transcript are designated hereinafter as "Transcript p. ___.") Officer Woods was six feet, one inch tall and weighed two hundred thirty pounds. Officer McMillian was "about six one, two hundred pounds." Transcript p.103. Respondent Woods estimated that the petitioner weighed "a hundred and seventy, a hundred and eighty pounds." Transcript p.122.

The trial court conducted a trial on the merits on March 10, 1987. The petitioner, respondent Woods and various witnesses for both sides testified and certain exhibits were admitted into evidence. On April 30, 1987, the trial court issued an opinion and judgment in favor of petitioner.

After reviewing the testimony and evidence in some detail, App. at 20-26, the trial court found that the respondents " . . . Woods and McMillian used force on the plaintiff when there was no need to use any force at all, and that [respondent] Mezo expressly condoned the use of force in this instance." *Id.* at 26. The trial court also found that "the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable for three to four months." *Id.*

The trial court, after reviewing some other use of force cases, stated:

> Here there was no need to use any force since the plaintiff was already in restraints. Since the plaintiff was harmed, the only explanation for it is the unnecessary use of force by Woods and McMillian. Mezo did not actually strike the plaintiff, but the credible testimony is that he was present, and in a position to stop Woods and McMillian, but instead acted only to temper their actions. This was an explicit approval of at least a limited beating. *The defendants' conduct can only be seen as motivated by malice.* All the defendants, by their acts of commission and omission, violated the plaintiff's rights under the Eighth Amendment by the use of unnecessary and excessive force.

*Id.* at 27-28. (Emphasis added.)



Finding that the "[p]laintiff proved only minor injuries to his back and mouth, and 'a strange feeling' when eating for several months," the trial court ruled that $800.00 was "sufficient to compensate the plaintiff for his injuries," and entered judgment for the plaintiff in this amount. *Id.* at 28-29.

The respondents appealed and the court of appeals accepted the factual findings of the trial court. The *per curiam* opinion of the court of appeals states:

> The evidence reflects that on October 30, 1983 Hudson got into an argument with McMillian who punched Hudson in the mouth, eyes, chest, and stomach while Woods held him. The blows cracked Hudson's partial dental plate, split his lower lip and loosened his teeth. He received bruises to his body but no other cuts. Woods kicked Hudson on his backside. Mezo, the supervisor of McMillian and Woods, watched the beating but merely cautioned the officers not to "have too much fun."

App. at 31.

The court of appeals went on to say that it "joins the magistrate in deploring the use of unnecessary force in the treatment of prisoners. Hopefully someday this blight on our criminal justice system will be forever removed." *Id.* at 32.

Nonetheless, the court of appeals applied the standard announced in its recent decision in *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990). That standard requires proof of the following elements:

1. the plaintiff suffered a significant injury;
2. the injury resulted directly and solely from a use of force that was clearly excessive to the need;
3. the use of force was objectively unreasonable; and
4. the action constituted an unnecessary and wanton infliction of pain.

If any one of these elements is absent, the plaintiff's claim fails. *Id.* at 841.

The court of appeals concluded that "[i]n the case at bar no force was required; therefore, the force used was objectively unreasonable. The conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain." App. at 32. Because "Hudson's claim, however, founders on the significant injury prong" (*id.*), the court of appeals reversed the judgment of the trial court.

The judgment of the court of appeals was entered on July 31, 1990. A timely petition for rehearing was denied by the court of appeals on September 4, 1990. The petition for writ of certiorari was filed on November 19, 1990, and this Court granted the petition and the motion for leave to proceed *in forma pauperis* on April 15, 1991. On April 29, 1991, the Court appointed the undersigned as counsel for the petitioner.

## SUMMARY OF ARGUMENT

The opinion of the court of appeals in this case unambiguously holds that, had the petitioner suffered a more



significant injury,[3] the judgment in his favor would have been affirmed. The findings of the trial court that there was no need for any force, and that the respondents acted with malice, and inflicted unnecessary and wanton pain, do not, in the view of the court of appeals, give constitutional import to the injuries sustained by petitioner. This cramped view of the Eighth Amendment is inconsistent with the repeated and clear holdings of this Court that it is the "unnecessary and wanton infliction of pain" that "constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)); *see also Wilson v. Seiter*, 59 U.S.L.W. 4671 (6/17/91). The precise question before this Court, therefore, is whether the court of appeals erred by superimposing a "significant injury" requirement on petitioner's otherwise valid Eighth Amendment claim. Petitioner submits that the court of appeals did err, and that its decision should be reversed with instructions to reinstate the judgment of the district court.

It has long been clear that physical injury is not a prerequisite for all Eighth Amendment claims. Not all physical injury causes pain, much less "significant" injury.[4] Indeed, the annals of torture and coercive

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[3] Even if some injuries from the excessive use of force by guards are so trifling that in some circumstances they do not trigger the protections of the Eighth Amendment, the facts in this case do not involve trivial or *de minimis* injuries.

[4] While truly *de minimis* inflictions of pain or other injury may not violate the Eighth Amendment, the lower court's "significant injury" test cannot be equated to a *de minimis* injury test, particularly in view of the facts of this case.

interrogation – and, in some instances, of penology – reveal many ingenious means of inflicting excruciating pain without visible or lasting injury, such as electric shock to sensitive areas and beating with rubber hoses. Nor is all pain physical in nature, a point recognized not only by the lower courts in prison brutality cases but by this Court in *Trop v. Dulles*, 356 U.S. 86 (1958), in which the Court held the punishment of denationalization to be unconstitutional in large part because "[i]t subjects the individual to a fate of ever-increasing fear and distress." *Id.* at 101-102.

Contrary to the position urged by the respondents, the extent of injury is probative of the amount of force actually used and the existence or absence of justification, but is not determinative of a constitutional violation. Here, there was *no* need for force, since the prisoner was in restraints and was held by one of the officers while the other beat him. In addition, the force used – repeated punches to the face and a kick to the back – was patently designed to inflict pain and injury rather than to bring the prisoner under control.

The trial court properly analyzed these factors and concluded that "[t]he defendants' conduct can only be seen as motivated by malice." App. at 28. There is no question that pain was inflicted, and no question that it was "unnecessary and wanton." No more is needed to prove an Eighth Amendment violation.[5] The court of

[5] The respondents' argument, which was not addressed by the court of appeals, that an isolated incident of brutality cannot violate the Eighth Amendment has been implicitly rejected by this Court and has been abandoned by the Fifth Circuit itself. *See* Section III, *infra*.



appeals' imposition of a "significant injury" requirement is without support in history, logic, or the text of the Eighth Amendment.

## ARGUMENT

### I. THERE IS NO BASIS FOR IMPOSING A "SIGNIFICANT INJURY" REQUIREMENT IN EIGHTH AMENDMENT USE OF FORCE CLAIMS

#### A. This Court's Eighth Amendment Decisions Focus on Whether Pain Was Inflicted, Not Whether a Significant Injury Resulted

The cases of this Court analyzing prisoners' claims under the Eighth Amendment consider whether the challenged acts inflicted pain, not whether a significant injury was sustained. Thus, for example, in *Whitley v. Albers*, 475 U.S. at 319, the Court held that a prisoner attempting to prove a violation of the Eighth Amendment must establish the "unnecessary and wanton infliction of pain." *See also Wilson v. Seiter*, 59 U.S.L.W. at 4671 (rejecting the proposition "that the 'wantonness' of conduct depends upon its effect upon the prisoner"); *Ingraham v. Wright*, 430 U.S. 651, 670 (1977); and *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). This is true whether the issue under scrutiny involves general conditions of confinement, *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); medical care, *Estelle v. Gamble*, 429 U.S. at 103; or security measures undertaken to restore order during a prison disturbance, *Whitley v. Albers*, 475 U.S. at 319. " '[U]nnecessary and wanton inflictions of pain' [include] those that are 'totally without penological justification.' " *Rhodes v. Chapman*, 452 U.S. at 346 (quoting *Gregg v. Georgia*, 428 U.S. at 183).

Accordingly, while the relevant considerations for establishing an Eighth Amendment violation may vary depending on the type of conduct under review,[6] there is no suggestion in these or other cases that a significant

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[6] "The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley*, 475 U.S. at 320.

Because the trial court found that the correctional officers acted with malice toward the petitioner, this case does not present the Court with the need to determine whether the "malicious and sadistic" state of mind standard that *Whitley* applied in the context of a prison riot governs other use of force situations. *Cf. Dudley v. Stubbs*, 109 S.Ct. 1095, 1097 (1989) (mem.) (O'Connor, J., dissenting from denial of certiorari) (arguing that full *Whitley* standard should be applied to prison officials' "splitsecond decision[s]" made in the face of serious threats to the security of the prison facility). Nor is the Court presented with the question of whether the Fifth Circuit's four-part use of force test is erroneous *in toto*, since the petitioner satisfied all the other elements of that standard. Accordingly, if the Court agrees with petitioner that significant injury is not a prerequisite to a § 1983 prison brutality claim, the Court need merely reverse with instructions to reinstate the judgment of the district court.

Similarly, there is no need to reach the respondents' claim that an isolated incident of guard brutality is insufficient to state a claim. The trial court specifically found that the incident was not isolated and the court of appeals did not disturb this finding. As discussed in Section III, *infra*, the view that isolated incidents of brutality are not actionable under the Eighth Amendment is inconsistent with this Court's decisions and appears to have been abandoned by the court of appeals in the formulation of its new standard.



physical injury is a prerequisite to establishing a violation.[7]

In *Estelle*, the Court held that the denial of medical care is cruel and unusual because, "[i]n the worst cases, [it can result in] physical 'torture or a lingering death,' the evils of most immediate concern to the drafters of the Amendment." 429 U.S. at 103. (Citation omitted.) However, the Court did not confine its reading of the Eighth Amendment to torturous conduct. It emphasized that, even "[i]n less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose." *Id.* (Citations omitted.) This violates the Eighth Amendment because "[t]he infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation . . . " *Id.*

In the case at bar, the court of appeals' focus on the severity of the injury rather than the wantonness of the pain inflicted on the prisoner is inconsistent with this Court's specific affirmation that mistreatment of prisoners less extreme than physical torture can violate the Eighth Amendment. In some cases the failure to treat a prisoner's serious medical needs, such as a denial of necessary anesthesia or pain medication, could cause

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[7] "There may be involved no physical mistreatment, no primitive torture," *Trop v. Dulles*, 356 U.S. at 101 (deprivation of citizenship); *accord, Weems v. United States*, 217 U.S. 349 (1910) (long prison sentence under oppressive conditions); *Robinson v. California*, 370 U.S. 660 (1962) (criminal punishment for status of drug addiction).

agonizing pain but might not result in further injury. The offense to the Eighth Amendment occurs when a prisoner is subjected to unnecessary pain, regardless of other injury.[8]

Consistent with the emphasis on the infliction of unnecessary pain and suffering, the Court in *Rhodes* examined the impact of the challenged conditions on prisoners and considered whether the conditions resulted in the deprivation of life's basic necessities. 452 U.S. at 347.[9] The existence or severity of any resulting injury was simply not at issue in determining whether those conditions constituted cruel and unusual punishment. *Id.*

Similarly, in *Hutto v. Finney*, 437 U.S. 678 (1978), the Court upheld restrictions on the length of confinement in punitive isolation based on the district court's finding that conditions there constituted cruel and unusual punishment.

> Confinement in punitive isolation was for an indeterminate period of time. An average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8' x 10' cells

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[8] *Estelle* certainly contemplates that some medical needs are so trivial that the failure to treat them is not of constitutional import. 429 U.S. at 104 ("We therefore conclude that deliberate indifference to *serious* medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.' ") (Emphasis added). The failure to treat minor aches and pains does not shock the conscience. By contrast, a brutal and unprovoked beating at the hands of law enforcement personnel does shock the sensibilities, regardless of the presence or absence of a significant injury.

[9] *See also Wilson v. Seiter*, 59 U.S.L.W. at 4672.



> containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell. *Holt v. Sarver*, 300 F.Supp. 825, 831-832 (ED Ark.1969) (Holt I). At night the prisoners were given mattresses to spread on the floor. Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening. *Id.*, at 832. Prisoners in isolation received fewer than 1,000 calories a day; their meals consisted primarily of 4-inch squares of "grue," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan.

*Id.* at 682-683. (Footnotes omitted).

The Eighth Amendment offense in *Hutto* consisted of the conditions themselves, not of any physical injury that may have resulted. Indeed, it is probable that a number of the *Hutto* prisoners suffered no significant injury as a result of these conditions.

The Court's decision in *Whitley, supra*, is also entirely consistent with petitioner's argument. Under *Whitley*, as in all Eighth Amendment cases, the ultimate inquiry is whether the governmental action inflicted unnecessary and wanton pain. In the particular context of the use of force in a prison riot, the infliction of pain is unnecessary and wanton only if the use of force is malicious and sadistic. In determining whether the use of force violated the Eighth Amendment, the Court in *Whitley* cited with approval the test developed by Judge Friendly in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1972), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973). One of the

factors in the *Glick* test is the extent of the injury inflicted.[10] However, by describing the *Glick* factors as "relevant to th[e] ultimate determination" (475 U.S. at 321), *Whitley* makes clear that the extent of the injury inflicted is relevant precisely because it assists the fact finder in determining "whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Id.* (Citation omitted).

By its own terms *Whitley* thus contemplates that if there is a complete absence of justification for the use of force, the intentional application of any force, beyond *de minimis* force, is unconstitutional. The presence or absence of justification is the test.[11] The "extent of injury

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[10] *See Johnson v. Glick* at 1033:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

[11] A focus on the justification for the use of force, rather than upon the nature and extent of the resulting injury, has been the approach of the American Correctional Association in its Standards for Adult Correctional Institutions. (3d ed. 1990). *See* § 3-4198:

> Written policy, procedure, and practice restrict the use of physical force to instances of justifiable self-defense, protection of others, protection of property,

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inflicted" is probative of the amount of force used and whether that force was excessive; it also bears on the sum to be awarded as damages.[12] However, it is not an independent requirement. Any infliction of unnecessary pain, beyond *de minimis* pain, is sufficient to establish a constitutional violation if the other elements of an Eighth Amendment violation are present.

In *Graham v. Connor,* 109 S.Ct. 1865 (1989), the Supreme Court again endorsed a construction of the

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> and prevention of escapes, and then only as a last resort and in accordance with appropriate statutory authority. In no event is physical force justifiable as punishment. A written report is prepared following all uses of force and is submitted to administrative staff for review.

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Comment:

> Correctional personnel should be prepared to justify their use of physical force. The phrase "as a last resort" may be defined through appropriate statutory authority.

[12] While actual damages must generally be proven to recover on a claim for violation of a substantive constitutional right, nominal damages are available in the absence of actual injury. *See Memphis Community School Dist. v. Stachura,* 477 U.S. 299, 308-309 n.11 (1986). Indeed, "[b]y making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed . . . or, in the case of exemplary or punitive damages, to deter or punish malicious deprivation of rights." *Id. See also Smith v. Wade,* 461 U.S. 30 (1983) (award of punitive damages to brutalized prisoner).

Eighth Amendment that focused on whether unnecessary pain had been inflicted:

> In *Whitley*, . . . [w]e began our Eighth Amendment analysis by reiterating the long-established maxim that an Eighth Amendment violation requires proof of the "unnecessary and wanton infliction of pain." We went on to say that when prison officials use physical force against an inmate "to restore order in the face of a prison disturbance, . . . the question whether the measure taken inflicted unnecessary and wanton pain . . . *ultimately turns* on whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." We also suggested that the other prongs of the *Johnson v. Glick* test might be useful in analyzing excessive force claims brought under the Eighth Amendment. But we made clear that this was so *not* because Judge Friendly's four-part test is some talismanic formula generally applicable to all excessive force claims, but because its four factors help to focus the central inquiry in the Eighth Amendment context, which is whether the particular use of force amounts to the "unnecessary and wanton infliction of pain."

109 S.Ct. at 1872-73 n.11. (Emphasis in original, citations and internal quotation marks omitted.) Accordingly, the Court in *Graham* repeated a formulation of the Eighth Amendment standard that requires the infliction of pain but does not include a requirement that the use of force inflict a significant injury. *See also Wilson v. Seiter*, 59 U.S.L.W. at 4671, 4673, rejecting the suggestion that there is some required minimum threshold of physical injury when it declined to accept respondents' argument that



the Eighth Amendment requires a higher level of culpability in cases which do not involve allegations of physical injury. The decision of the court of appeals in this case fails to take into account this Court's focus on pain rather than injury, and imposes a "significant injury" requirement without explanation or citation to authority other than its own.[13]

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[13] The Fifth Circuit, in a case subsequent to *Graham v. Connor*, has also applied a "significant injury" test in the Fourth Amendment area. *See Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (*en banc*). The court of appeals cited *Morel* in support of its decision in this case. In Judge Rubin's concurring opinion in *Morel*, speaking for seven members of the court, he criticized the majority for adopting an injury requirement, and made the following observation:

> The *Graham* Court was at least given the opportunity to consider whether it should impose a "severe" injury requirement. In the amicus brief filed by the United States in *Graham*, the Solicitor General argued that the Court should adopt the reasonableness standard, but that:
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> > [A] "severe injury" requirement is . . . inappropriate. Under that standard, a police officer could, without any justification, beat a person on the head with a club if the beating causes only a bruise. Similarly, a police officer could terrorize a nondangerous suspect by pointing a gun at his head if the chambers of the gun are empty. In short, acceptance of the standard would allow the unreasonable use of force in cases where police conduct poses a grave risk and causes terror or even physical harm, but where the person seized, by chance, does not suffer a "severe injury."

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### B. Petitioner's Position Is Supported by the History of the Eighth Amendment

This Court determines whether an act of punishment should be condemned as a violation of the Eighth Amendment by two routes: (1) whether the punishment was considered cruel and unusual at the time that the Eighth Amendment was adopted,[14] or (2) whether the punishment is contrary to evolving standards of decency. *Stanford v. Kentucky*, 109 S.Ct. 2969, 2974 (1989). Here there can be little doubt that the infliction of pain without penological purpose is inconsistent with evolving standards of decency.[15] Not surprisingly, therefore, the Court has long rejected the argument that "evolving standards of decency" require physical injury as a prerequisite for an Eighth Amendment claim.

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Although the Court did not rule on the question explicitly, its opinion surely contains no quantum-of-injury criterion.

*Id.* at 481 (footnote omitted).

[14] The prohibition on cruel and unusual punishments in the Eighth Amendment comes from the English Declaration of Rights of 1689. The English Declaration of Rights was in large part directed at punishments not authorized by statute. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L.Rev. 839, 860 (1969). This interpretation of the cruel and unusual punishment clause is consistent with a ban on beatings and other punishments unauthorized by statute.

[15] In the earliest cases raising Eighth Amendment claims, the Court focused on the cruelty of the challenged punishment. The Court's emphasis in these early cases on whether punishment was inhumane and involved the gratuitous infliction of

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For example, in *Weems v. United States*, 217 U.S. 349 (1910), the Court rejected a sentence of imprisonment under harsh conditions (a sentence to *"cadena dura"* under the Philippine Code) because the conditions of the sentence imposed pain. *Id.* at 366. Nothing in the sentence to *cadena dura* necessarily inflicted physical injury. For the first time the Court rejected the proposition that the Eighth Amendment reaches only punishments that are "inhuman and barbarous, – torture and the like." 217 U.S. at 368. The Court rejected the view that the Eighth Amendment "was intended to prohibit only practices like the Stuarts', or to prevent only an exact repetition of history." *Id.* at 373.

In *Trop v. Dulles*, 356 U.S. 86 (1958), this central principle was crystallized in the Court's pronouncement that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. In *Trop*, the Court struck down as inconsistent with the Eighth Amendment the punishment of denationalization, and thus followed

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suffering is entirely consistent with the modern day proscription against the unnecessary infliction of pain. *See Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (upholding death by shooting); *In re Kemmler*, 136 U.S. 436, 447 (1890) (electrocution). In these cases, the Court evaluated methods of execution by assessing their similarity to torture and other barbarous punishments. *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (second attempt at electrocution found not to violate Eighth Amendment, since failure of initial execution attempt was "an unforeseeable accident" and "[t]here [was] no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution").

*Weems* in invalidating under the Eighth Amendment a punishment that imposed no physical injury. The Court came to this conclusion, in part, because the condition of statelessness "subjects the individual to a fate of ever-increasing fear and distress." *Id.* at 101-102. No less is at issue here. Certainly, the lower court's refusal to protect prisoners from guard abuse similarly exposes them to anxiety and distress. The holding in *Trop* is thus manifestly inconsistent with the argument that a significant physical injury is required to state a violation of the Eighth Amendment.

Moreover, an assessment of "evolving standards of decency," as required by *Weems*, does not call for a subjective judgment. It requires, rather, that the Court look to objective indicia that reflect the public attitude toward a given sanction. *See Gregg v. Georgia*, 433 U.S. at 172-173, and *Stanford v. Kentucky*, 109 S.Ct. at 2975. "[F]irst among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives." *Stanford*, 109 S.Ct. at 2975. (Internal quotation marks omitted.) Both the federal government[16] and numerous states have specifically

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[16] *See* 18 U.S.C. § 241. In *U.S. v. Bigham*, 812 F.2d 943 (5th Cir. 1987), the court of appeals considered a criminal prosecution of guards under 18 U.S.C. §§241 and 242. One prisoner had suffered "a one and one half inch laceration over his eye, several burns, swollen testicles, and bruises and abrasions on the upper part of his body. The other [prisoner] suffered bruises and abrasions on the upper part of his body [, . . . ] a blister on his foot," and blood in his stool the next day. *Id.* at 945. One of the guards claimed on appeal that the jury instructions should have required the jury to consider whether the

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criminalized the unnecessary use of force against prisoners;[17] no state has affirmatively approved such conduct. The public reaction to the events at Attica and the recent police beating in Los Angeles also demonstrates that American society condemns official brutality and abuse.

The Court's discussion in *Trop* also makes clear that a penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." 356 U.S. at 100. In striking down the deprivation of citizenship as a sanction for wartime desertion as cruel and unusual punishment, the Court in *Trop* stated that denationalization was "a form of punishment more

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prisoners' injuries were severe. The court of appeals cited with approval the trial court's instructions that "the Constitution protects persons from 'unauthorized violence' and that liberty 'includes the principle that no person may ever be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under the color of the laws of any state.' " *Id.* at 949. It then upheld the findings of guilt, concluding that "[a]s excessiveness of force was not at issue in this trial, neither was there an issue of triviality of injury." *Id.*

[17] *See* Ala. Code Tit. 14, Sec. 14-11-1 (1975); Ariz. Rev. Stat. Ann. Sec. 31-127 (1986); Cal. Penal Code Ann. Tit. 1, Sec. 2652 (Supp. 1982); Fla. Stat. Ann. Sec. 944.36 (1985); Ga. Code Ann. Sec. 42-5-58 (1989); Idaho Code Ann. Sec. 18-706 (1987); Ind. Ann. Stat. Sec. 11-11-54 (1988); Kan. Stat. Ann. Sec. 21-3425 (1981); Miss. Code Ann. Sec. 47-1-27 (1972); Mo. Stat. Ann. Sec. 217-405 (1991); Neb. Rev. Stat. Sec. 83-4, 114 (1987); Nev. Rev. Stat. Ann. Sec. 209.371 (1986-1989); N.D. Code Sec. 12-47-26 (1985); Okla. Stat. Ann. Tit. 57, Sec. 9 (1969); Oreg. Rev. Stat. Ann. Secs. 421.105(2), 421.990(2) (1989); S.D. Code Sec. 24-2-10 (Rev. 1988); Tex. Crim. Proc. Code Ann. Arts. 1.09, 16.21, 43.24; Vt. Stat. Ann. Sec. 853 (1986).

primitive than torture, for it destroys for the individual the political existence that was centuries in the development." *Id.* at 101.

Surely American society has evolved to the point where the unprovoked beating of prisoners is inconsistent with human dignity and violates contemporary "standards of decency." A finding of cruel and unusual punishment does not depend upon the use of physical violence like the strap, the rack, or the wheel of old. The horrors of the "Tucker Telephone" and the whipping post,[18] common to Arkansas prisons of the past, should not be encouraged to return. Yet abusive and sometimes sadistic practices continue in our prisons. In one recent case involving the strip search of a prisoner, the guard ordered the prisoner to spread his legs further apart and tapped the inside of his legs with a riot stick. When the prisoner involuntarily giggled, the guard said "Oh, you think that's funny, huh?" and attempted to plunge the riot stick into the prisoner's anus. Because of the force used, the guard ruptured one of the prisoner's hemorrhoids. On these facts, an Eighth Amendment violation was properly found. *McRorie v. Shimoda*, 795 F.2d 780, 781-84 (9th Cir. 1986). *See also Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986) (proof that officer waved knife in paraplegic prisoner's face, extorted food from him, taunted him verbally, and failed to relay requests for

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[18] The "Tucker Telephone" was used to administer electrical shocks to various sensitive parts of a prisoner's body. *Hutto v. Finney*, 437 U.S. at 682 n.5. Prisoners were also routinely lashed with a wooden-handled leather strap five feet long and four inches wide, some until their skin was bloody and bruised. *Id.* at n.4.



medical care so that he lay in his own feces for hours, established Eighth Amendment violation).

Although prisoners surrender many rights upon conviction, they retain the right to be free from the terror of instant and unexpected brutality at the hands of their jailers. In both of the examples given above, while the extent of the resultant injury may be debated, the cruelty of the officers and the pain caused by their malicious acts cannot. Whatever force may be necessary to manage a prison population and to protect the safety of guards and prisoners, the gratuitous and unprovoked infliction of pain is simply unacceptable. The offense to the Eighth Amendment is in the brutalization of the prisoner – not the severity of the resulting injury. This judgment should not change merely because the guards are clever enough to leave no marks.

Not only do these practices demean the human dignity of the prisoner involved, but because they reflect the extent to which society will tolerate such practices, they affect us all. Implicit in the Court's opinion in *Trop* is the concept that in this society there are certain standards of human decency that limit the kind of punishment officials may inflict on anyone, regardless of his or her offense. Though this case may deal with prisoners, how society punishes those who may be viewed as its least deserving members ultimately cannot be separated from the constitutional protections that shelter all Americans from official abuse.[19]

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[19] "Prison is, after all, the largest power that the state exercises in practice, on a regular basis, over its citizens. . . .

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The decision of the court of appeals in this case, while "deploring the use of unnecessary force in the treatment of prisoners," tacitly gives its imprimatur to such practices. App. at 32.[20] While the court of appeals expressed hope that "someday this blight on our criminal

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Perhaps if we can bring principle and justice to the exercise of the power of imprisonment, much else will improve in the uneasy tensions between freedom and authority in post-industrial society." Norval Morris, *The Future of Imprisonment* (1974), p.2.

[20] A classic prison simulation study illustrates the danger of loosening constraints on the use of force by correctional officers. In this study, a mock "prison" was constructed in the basement of the psychology building at Stanford University. The subjects were middle-class, white male college students, specifically selected for physical and mental health, maturity, and lack of previous involvement in anti-social behavior. On a random basis, half of the subjects were assigned the role of "guard," the other half that of "prisoner." Haney, Banks and Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 Int'l J. Criminology and Penology 69, 73 (1973).

Except for the fact that the "guards" were explicitly forbidden to use physical force on the "prisoners," the "prison" was designed to be as realistic as possible. The "prisoners" remained in the "prison" twenty-four hours a day; the "guards" worked eight-hour shifts. Both "prisoners" and "guards" wore uniforms; the "prisoners" were assigned jobs, had recreation and exercise periods, and were counted three times a day. *Id.* at 74-77.

The experiment, which had been scheduled to run for two weeks, had to be terminated after only six days. In that time, five of the ten "prisoners" had to be released because of

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justice system will be forever removed," its opinion is a step in the opposite direction. *Id.*[21]

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extreme depression, crying, rage, and acute anxiety. Meanwhile, the "guards" steadily escalated their harassment of and aggression against the "prisoners," especially when they thought they were not being watched by the experimenters. "[W]e witnessed a sample of normal, healthy American college students fractionate into a group of prison guards who seemed to derive pleasure from insulting, threatening, humiliating and dehumani[z]ing their peers. . . . Most dramatic and distressing to us was the observation of the ease with which sadistic behavior could be elicited in individuals who were not "sadistic types" and the frequency with which acute emotional breakdowns could occur in men selected precisely for their emotional stability." *Id.* at 89.

Many other studies confirm that ordinary people will perform acts of appalling cruelty when they believe such behavior is encouraged or condoned by those in authority. *See, e.g.*, Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 Human Relations 57 (1965) (in response to experimenter's instruction, subjects repeatedly administered what they believed to be increasingly high-voltage electrical shocks to a person strapped in an electric chair in an adjacent room, even after the "victim" protested that he was in pain, demanded to be released from the experiment, pleaded that he had heart trouble, and finally ceased to respond altogether except to shriek in agony).

These dramatic results suggest that there are forces inherent in the prison environment that can lead to abuse of prisoners by correctional officers. If this is the case, the need for an unequivocal, bright-line rule against such behavior is especially clear. Officers should not be told, explicitly or implicitly, that an "insignificant" beating is acceptable.

[21] In a very recent opinion from a district court in the Fifth Circuit, the court applied the Fifth Circuit "significant injury"

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## II. THE HOLDING OF THE COURT OF APPEALS IS INCONSISTENT WITH THE DECISION OF EVERY OTHER COURT OF APPEALS THAT HAS EXPRESSLY CONSIDERED THIS ISSUE

The facts of this case in no sense involve trivial or *de minimis* injuries. The court of appeals noted that the evidence reflected that, while one guard restrained the

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standard to affirm the finding of the magistrate that a beating incident did not violate the Eighth Amendment, and reversed a judgment in the prisoner's favor based on a Fourteenth Amendment failure to protect claim arising from an incident in which other prisoners scalded the plaintiff with boiling water.

In the course of applying the "significant injury" test, Chief Judge Parker, who presides in the same judicial district where the case at bar arose, and has heard countless excessive force claims initiated by prisoners confined at Angola, said the following:

> This court is, of course, bound by all Fifth Circuit precedent and must apply it. The court feels compelled to note, however, that the "significant injury" standard established by *Huguet* and its progeny seems destined to encourage venal prison guards in their deliberate use of force upon inmates. When the courts tell correctional officers that they are free to use force at will, provided they stop short of what the Fifth Circuit calls "significant injury," the courts in effect pronounce an "open season" upon inmates which is likely to encourage unrestrained correctional officer use of force and violence in penal institutions. Ultimately, there is strong probability of an increasing number of "significant injuries" to be inflicted by correctional officers who did not know when to stop.

*Williams v. Blackburn*, 761 F.Supp. 24, 26 (M.D.La. 1991).



prisoner, the other punched him in the mouth, eyes, chest, and stomach. The blows cracked the prisoner's partial plate, split his lower lip, loosened his teeth, and bruised him. One of the guards kicked his backside, while the supervisor watched the beating and cautioned the guards against "hav[ing] too much fun." App. at 31. It would cripple the Eighth Amendment to decide that such conduct by public officials does not constitute cruel and unusual punishment because it did not impose a significant injury.[22]

With the exception of the Fifth Circuit, the lower courts have been essentially unanimous in their view that unprovoked beatings by correctional officers violate the Eighth Amendment. While "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights" (*Johnson v. Glick*, 481 F.2d at 1033),[23] the application of force "for the very purpose of causing harm"

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[22] Indeed, even if this Court were to decide that the Eighth Amendment standard does require, in this context, a significant injury, the Court should reverse the judgment of the court of appeals and reinstate the judgment in favor of petitioner because, as a matter of law, the petitioner did sustain a significant injury as a result of the beating.

[23] Petitioner agrees that not every "push or shove" states an Eighth Amendment claim. *See, e.g., Black Spotted Horse v. Else*, 767 F.2d 516 (8th Cir. 1985) (allegation that guard pushed prisoner against cubicle wall and poked him in the back with his arm or finger). But some shoves may suffice. *See H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1085-86 (11th Cir. 1986) (guard gratuitously slammed juvenile prisoner into wall for "giggling").

(*Whitley*, 475 U.S. at 321, quoting *Johnson v. Glick*, 481 F.2d at 1033), can serve no legitimate governmental purpose. *Whitley* at 321-22 (The "wide-ranging deference" normally accorded prison officials "does not insulate from review actions taken in bad faith and for no legitimate purpose"). Heeding this Court's instruction to determine the necessity for the use of force, the lower courts have concluded that official force directed toward illicit ends may offend the Constitution even though the same amount of force deployed in aid of a legitimate official purpose would not.

One court has aptly commented on facts very similar to those presented here, in a case in which the defendants argued that the injuries sustained by a prisoner did not implicate the Eighth Amendment:

> Many things – beating with a rubber truncheon, water torture, electric shock, incessant noise, reruns of "Space 1999" – may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks. Cf. *Lewis v. Lane*, 816 F.2d 1165, 1171 (7th Cir. 1987). The injury must be more than trifling – an allegation that a guard curled his lip at Williams without notice and an opportunity for a hearing would not state a claim, *see Bart v. Telford*, 667 F.2d 622, 625 (7th Cir. 1982) (*de minimis non curat lex* applies to constitutional torts as well as common law torts) – but Williams's injuries exceed that threshold.[24]

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[24] The beating at issue in *Williams* caused the prisoner headaches for weeks and left a scar. The prisoner was also

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*Williams v. Boles*, 841 F.2d 181, 183 (7th Cir. 1988) (Easterbrook, J.). The cases that have specifically addressed the issue are in accord with this fundamental principle, whether analyzing it under the Eighth Amendment or as a substantive due process claim.[25]

Most courts therefore treat the extent of injury as but one of the factors to be considered. "Even if the injuries suffered 'were not permanent or severe,' a plaintiff may still recover if 'the force used was unreasonable and excessive.' "[26] Indeed, other courts have upheld constitutional claims in which no physical injury was

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maced, which caused burning of the skin and eyes for ten hours. The restraints used in conjunction with the attack temporarily limited the mobility of the prisoner's fingers. *Id.* at 182.

[25] *Gray v. Spillman*, 925 F.2d 90, 93 (4th Cir. 1991) (rejecting serious injury requirement under Fifth and Fourteenth Amendments and construing *King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980) (prison case) as specifically rejecting a serious injury requirement); *McHenry v. Chadwick*, 896 F.2d 184, 187 (6th Cir. 1990); *Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988); *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986); *Norris v. District of Columbia*, 737 F.2d 1148, 1151 (D.C.Cir. 1984). *See also H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1086 (11th Cir. 1986) (gratuitously slamming prisoner against wall, resulting in no permanent injuries); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981) (display of revolver with threat to kill). *Cf. Brown v. Hughes*, 894 F.2d 1533, 1558 (11th Cir. 1990) ("Deliberately inflicted pain, as with an electric cattle prod, does not become unimportant and unactionable under the Eighth Amendment simply because the pain produced is only momentary.").

[26] *Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988) (jury question was presented where prisoner was allegedly knocked unconscious and sustained cuts, swelling, dizziness and

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alleged, although most of them involved a serious threat to life or other extreme circumstances.[27]

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blurred vision). *See also Burgin v. Iowa Dept. of Corrections*, 923 F.2d 637 (8th Cir. 1991) (multiple abrasions and contusions and bloody nose, and a tender left clavicle); *Campbell v. Grammer*, 889 F.2d 797, 802 (8th Cir. 1989) (injuries from completely unjustified spraying with a fire hose were actionable even though not severe); *United States v. Bigham*, 812 F.2d 943, 949 (5th Cir. 1987) and cases cited in n.4 (severity of injury "tends to prove degree of force and the existence or absence of its justification"); *Byrd v. Clark*, 783 F.2d 1002, 1006 (11th Cir. 1986) (severity of injury is not determinative of constitutional violation but is probative of the amount of force used); *Johnson v. Doherty*, 713 F.Supp. 69, 71 (S.D.N.Y. 1989) (where injury is minor, "court must consider the context in which the incident occurred"); *Bowman v. Casler*, 622 F.Supp. 836, 838 (N.D.N.Y. 1985).

[27] *See, e.g., Jackson v. Crews*, 873 F.2d 1105, 1108 (8th Cir. 1989) (threat to break the plaintiff's neck could violate the Fourth Amendment); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (interrogation at gunpoint may deny due process); *Parrish v. Johnson*, 800 F.2d 600, 605, 611 (6th Cir. 1986) (verbal threats and waving of knife violated the Eighth Amendment; damages awarded); *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986) (death threat made at gunpoint by a prison guard was "a wanton act of cruelty which . . . was brutal despite the fact that it resulted in no measurable physical injury"); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (dictum) (brandishing a cocked gun in a civilian's face would state a constitutional claim); *Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981) (damages awarded against officer who brandished a loaded gun at point-blank range); *Oses v. Fair*, 739 F.Supp. 707, 709-710 (D.Mass. 1990) (Eighth Amendment was violated when an officer struck prisoner on the head, stuck gun barrel into his mouth, and made him kiss the officer's wife's shoes); *Parker v. Asher*, 701 F.Supp. 192, 194-195 (D.Nev. 1988) (threatening a prisoner with a taser gun solely to inflict fear stated an Eighth

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When there is no need to use any force, the intentional infliction of even relatively minor injuries violates the Constitution.[28] In contrast, when the use of some

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Amendment claim); *Henson v. Thezan*, 698 F.Supp. 150, 152 (N.D.Ill. 1988) (photographs and medical records showing no injury did not require dismissal of a case in which the plaintiff alleged he was abused for hours); *Douglas v. Marino*, 684 F.Supp. 395, 398 (D.N.J. 1988) (similar to *Parrish*). *But see Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir. 1990) (putting a loaded revolver in the plaintiff's mouth and threatening to blow his head off did not inflict "significant" injury); *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223, 1230 (5th Cir. 1988) (pointing a loaded gun did not violate the Constitution); *see also Johnson v. Morel*, 876 F.2d 477, 480 n.1 (5th Cir. 1989) (*en banc*) (it is possible but "unlikely" that a nonphysical injury might constitute a "significant injury").

[28] *Oliver v. Collins*, 914 F.2d 56, 59 (5th Cir. 1990) (contusions, edema, lumps, and bruises stated a claim where the force was completely unprovoked); *Molton v. City of Cleveland*, 839 F.2d 240, 248-250 (6th Cir. 1988) (bruises, abrasions and a nosebleed stated a claim where an arrestee was knocked down and kicked while handcuffed); *Franklin v. Aycock*, 795 F.2d 1253, 1256-1258 (6th Cir. 1986) (damages awarded for "trauma and abrasions" to back, shoulder and ankle; no force was actually needed); *Harrison v. Byrd*, 765 F.2d 501, 504 (5th Cir. 1985) (bruises and knots were actionable where the plaintiff alleged he was repeatedly stomped while in handcuffs); *Simpson v. Saroff*, 741 F.Supp. 1073, 1078 (S.D.N.Y. 1990) (allegations of a punched stomach, swollen and bleeding wrists from tight handcuffs, and a faintly detectable scar on the wrist stated a Fourth Amendment claim); *Smallwood v. Renfro*, 708 F.Supp. 182, 188 (N.D.Ill. 1989) (no requirement of "serious injury" where force was used gratuitously; choking the plaintiff and hitting him in the arm with a radio for no reason stated an Eighth Amendment claim); *Zumbroegel v. City of Dearborn*

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force is justified, minor injuries that result do not violate the Eighth Amendment.[29] And if the defendants are reasonably responding to a major threat to safety or security, even crippling or life-threatening force may not be unconstitutional. *See Whitley, supra.*

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*Heights*, 705 F.Supp. 358, 363 (E.D.Mich. 1989) (slamming the plaintiff against a police car, handcuffing him too tightly, and striking him in the face after he had been handcuffed could violate the Constitution); *Bellamy v. McMickens*, 692 F.Supp. 205, 213 (S.D.N.Y. 1988) (where the plaintiff had broken some light fixtures but claimed he did not resist the officers and was beaten after he was handcuffed and sustained bruises and embedded glass fragments, officers were not entitled to summary judgment); *Brown v. Triche*, 660 F.Supp. 281, 284-287 (N.D.Ill. 1987) (swelling, abrasions, small laceration, loss of consciousness inflicted on a handcuffed prisoner who did not sit down when ordered violated the Constitution); *Burris v. Kirkpatrick*, 649 F.Supp. 740, 741, 745 (N.D.Ind. 1986) (damages awarded for a non-permanent burn where a guard threw hot water at another inmate and hit the plaintiff); *Williams v. Omodt*, 640 F.Supp. 120, 121-123 (D.Minn. 1986) (damages awarded for "bruises, contusions, swelling, and considerable pain" where there was no justification for any force); *Velleff v. Cantwell*, 630 F.Supp. 346, 347 (N.D.Ill. 1986) (infliction of lacerated lip and bruised eye and jaw by sheriff who hit the plaintiff in the face while two deputies held him raised a jury question).

[29] *White v. Roper*, 901 F.2d 1501, 1507 (9th Cir. 1990) (cut wrist and bruises not requiring medical treatment did not violate the Constitution where the plaintiff had resisted being placed in a cell); *Gassner v. City of Garland, Texas*, 864 F.2d 394, 400 n.11 (5th Cir. 1989) (scratches and bruises did not violate the Constitution where the plaintiff had resisted arrest); *Pressly v. Gregory*, 831 F.2d 514, 517-518 (4th Cir. 1987) (complaint of

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The court of appeals has expanded, through the back door, the circumstances in which correctional officers can abuse their power by using force when no force is necessary. This construction of the Eighth Amendment creates a gap in the coverage of the Amendment. Although this Court has repeatedly held that the Eighth Amendment prohibits the wanton and unnecessary infliction of pain, correctional officials, under the lower court's test, may now avoid liability for injuries, wantonly and unnecessarily inflicted, that are not visible or lasting, yet may be agonizingly painful.[30] Under the approach of the court of

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pain unverified by medical evidence did not support a constitutional claim where the plaintiff admitted he resisted handcuffing); *Bony v. Brandenburg*, 735 F.Supp. 913, 915 (S.D.Ind. 1990) (infliction of scrapes and scratches did not violate the Constitution where the plaintiff refused to leave his cell and had to be removed forcibly); *Brooks v. Pembroke City Jail*, 722 F.Supp. 1294, 1300 (E.D.N.C. 1989) (infliction of black eye did not violate the Constitution where prisoner resisted officers trying to put out a fire in his cell); *Francis v. Pike County, Ohio*, 708 F.Supp. 170, 171-172 (S.D.Ohio 1988) (contusions and abrasions on an arrestee who had refused to be handcuffed did not by themselves raise a factual issue as to excessive force).

[30] Establishing a "significant injury" threshold may also create a perverse incentive for prison personnel to avoid proper medical care and documentation of injuries, whether by keeping prisoners away from medical staff or by pressuring medical staff to minimize their documentation of injuries. *See, e.g., H.C. by Hewett v. Jarrard*, 786 F.2d at 1083 (beaten prisoner's requests for medical care delayed three days before he

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appeals, various kinds of torture have been placed beyond the pale of the Constitution.[31]

## III. AN ISOLATED INCIDENT OF WANTON AND UNNECESSARY INFLICTION OF PAIN IS SUFFICIENT TO STATE AN EIGHTH AMENDMENT CLAIM

Petitioner anticipates that respondents may assert, as an alternative ground for affirming the decision of the court of appeals, that an isolated assault does not constitute "punishment" within the meaning of the Eighth Amendment.[32] This Court, however, has never required

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was transported to emergency room of local hospital from isolation cell). *Cf. Thomas v. City of New Orleans*, 687 F.2d 80, 82 (5th Cir. 1982) (testimony by former New Orleans Chief of Police that a "blue curtain" or code of silence exists on almost every major police force); *Bonsignore v. City of New York*, 521 F.Supp. 394, 398-99 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 635 (2d Cir. 1982) (unrebutted testimony as to the existence of a code of silence in the New York City Police Department). In this case, the petitioner testified that, following the beating, "he repeatedly sought medical attention but was refused." App. at 25.

[31] *See, e.g., Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir. 1990) (twice striking the prisoner and putting a loaded revolver in his mouth and threatening to blow his head off did not inflict significant injury).

[32] The respondents provide neither discussion of, nor authority for, this proposition in their brief opposing the petition for certiorari. The district court in this case specifically found that the beating was not an isolated incident. After the respondents finished beating petitioner, they came back and beat a second prisoner. App. at 27 n.1. The opinion of the court of appeals contains no discussion of this issue.



proof of something other than an isolated incident in prison Eighth Amendment cases.

In *Estelle v. Gamble*, an individual medical care case, the Court held that deliberate indifference to serious medical needs violates the Eighth Amendment whether manifested by prison doctors or by prison guards; it did not except "isolated" incidents and, indeed, cited with approval several cases in which Eighth Amendment violations were found resulting from a single incident.[33]

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[33] In *Estelle*, the Court held that no matter "how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." 429 U.S. at 105. This is the case "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id.* at 104-105. In *Estelle*, the Court cited several cases in which federal courts correctly found an Eighth Amendment violation based on a single incident. *Id.* at 104 n.10, citing *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974) (doctor's choice of the "easier and less efficacious treatment" of throwing away the prisoner's severed ear and stitching the stump may be attributable to "deliberate indifference . . . rather than an exercise of professional judgment"); *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir. 1974), *cert. denied sub nom. Thomas v. Cannon*, 419 U.S. 879 (1974) (injection of penicillin with knowledge that prisoner was allergic, and refusal of doctor to treat allergic reaction); *Jones v. Lockhart*, 484 F.2d 1192 (8th Cir. 1973) (refusal of paramedic to provide treatment); and *Martinez v. Mancusi*, 443 F.2d 921 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon).

Similarly, in *Whitley v. Albers*, the Court ruled that the shooting of one prisoner during the suppression of a prison riot was not actionable without a showing of malicious intent; but the Court made no suggestion that the apparent uniqueness of the incident in question played any part in its analysis.

Most recently, the Court has addressed the "isolated incident" question directly in *Wilson v. Seiter*, rejecting any distinction between acts directed at individual prisoners and conditions inflicted on groups of prisoners:

> It seems to us, however, that if an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else. Undoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is a "condition of confinement" and the other is not – much less that the one constitutes "punishment" and the other does not.

59 U.S.L.W. at 4672 n.1. (Emphasis in original.)

For these reasons, respondents cannot successfully argue that isolated beatings do not violate the Eighth Amendment.[34] Indeed, the court of appeals below

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[34] The protections of the Cruel and Unusual Punishments Clause extend to each individual; and as *Wilson* makes clear, punishment that is inhumane when applied to ten or a hundred prisoners is no less inhumane when "isolated," that is, limited to one or two prisoners. Indeed, an isolated incident – i.e., one which significantly departs from the norm of prison

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apparently agrees that "isolated incidents" of guard brutality can violate the Eighth Amendment. In *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990), the case in which the Fifth Circuit first announced the "significant injury" test governing Eighth Amendment cases, there was stated no requirement that the injury result from a pattern or practice of brutality, although the facts of that case indicate that the alleged use of excessive force would properly be classified as an "isolated incident."[35] Similarly, in this case, although the issue of an "isolated incident" was specifically raised by the respondents, the court of appeals neither discussed nor decided the issue, suggesting that this is no longer relevant under the Eighth Amendment.

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administration and discipline – is likely to be not only "unusual" in the literal sense but unsupported by any penological justification. The consequences of adopting an "isolated incident" limitation on the Eighth Amendment would be that no individual prison brutality case could ever be tried and decided without also trying and deciding the facts of some indeterminate number of other incidents.

[35] *See* p.5, *supra*.

## IV. CONCLUSION

For the above reasons, petitioner urges this Court to reverse the court of appeals and reinstate the judgment of the district court in favor of petitioner.

Respectfully submitted,

ALVIN J. BRONSTEIN*
(Appointed by This Court)
MARK J. LOPEZ
ELIZABETH ALEXANDER
DAVID C. FATHI
MOHAMEDU F. JONES
National Prison Project of the
American Civil Liberties Union
Foundation
1875 Connecticut Ave., N.W.
Suite 410
Washington, DC 20009
202/234-4830

*Counsel of Record

# RESPONDENT'S

# BRIEF

No. 90-6531

(6)

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1991

KEITH HUDSON,

*Petitioner,*

versus

JACK MCMILLIAN, CSO II, MARVIN WOODS, CSO II, AND ARTHUR MEZO, LIEUTENANT,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF RESPONDENTS

WILLIAM J. GUSTE, JR.
Attorney General For The State Of Louisiana

HARRY MCCALL, JR.
JONATHAN C. MCCALL
Special Assistant
Attorneys General
CHAFFE, MCCALL, PHILLIPS
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana
70163-2300
(504) 585-7000

JENIFER SCHAYE
CLIFTON O. BINGHAM, JR.
HOUSTON C. GASCON, III
JOSEPH ERWIN KOPSA*
Assistant Attorneys
General
Department of Justice
Division of Risk Litigation
Post Office Box 94095
626 N. 4th Street, 6th Floor
Baton Rouge, Louisiana
70804-9095
(504) 342-8495

*COUNSEL FOR RESPONDENTS*

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTION PRESENTED

Did the Fifth Circuit apply the correct legal test when determining that petitioner's claim that his Eighth Amendment rights under the Cruel and Unusual Punishment Clause were not violated as a result of a single incident of force by the respondents which did not cause a significant injury?[1]

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[1] This Court's grant of a writ was expressly limited to that question. *See* This Court's order of April 29, 1991. Prisoner Hudson's brief at i attempts to change it to:

> Whether the court of appeals erred in holding that the Eighth Amendment cannot be violated by the beating of a prisoner by guards unless the beating results in significant injury, when it accepted the trial court's findings that respondents acted with malice, that they did not need to use any force against petitioner, and that the force inflicted unnecessary and wanton pain.

The United States in its amicus curiae brief at (I) attempts to change it to:

> Whether the court of appeals correctly determined that a beating by prison guards that "occasioned unnecessary and wanton infliction of pain," J.A. 32, did not constitute cruel and unusual punishment because the prisoner did not suffer "a significant injury," J.A. 33.

Prisoner Hudson's brief says at 30-33 that the issue of "single incident" is not before This Court in this case. The United States' brief says at 6-7 n.1 that the question whether the actions complained of constitute "punishment" within the meaning of the Eighth Amendment is not before This Court. The question accepted for review by This Court, however, as

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## QUESTIONS PRESENTED – Continued

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opposed to those posed by Prisoner Hudson and by the United States in their briefs, expressly includes the question whether a single incident of force on a prisoner constitutes punishment under the Eighth Amendment. As stated in the brief of the United States at 7 n.1, "greater doctrinal clarity in this respect is of increasing practical importance in view of the substantial expansion in recent years in the number of cases of this sort." Because of the nature of the type of alleged conduct complained of by Prisoner Hudson the issue of whether the conduct constituted "punishment" within the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause is within This Court's grant of plenary review. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984), and *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 414 (1982).



## TABLE OF CONTENTS


Page

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

CONSTITUTIONAL AND STATUTORY PROVISIONS ..... 2

STATEMENT OF THE CASE ..... 4

SUMMARY OF ARGUMENT ..... 12

ARGUMENT ..... 13

I. THE CONSTITUTIONAL FRAMEWORK ..... 13

A. THE EIGHTH AMENDMENT HAS DIFFERENT STANDARDS FOR CHALLENGES TO SENTENCES AND CHALLENGES TO CONDITIONS OF CONFINEMENT ..... 13

B. IN EIGHTH AMENDMENT CHALLENGES TO CONDITIONS OF CONFINEMENT, THIS COURT REQUIRES BOTH OBJECTIVE AND SUBJECTIVE COMPONENTS ..... 19

C. A PRISONER WHO DOES NOT HAVE AN EIGHTH AMENDMENT CLAIM MAY HAVE A FOURTEENTH AMENDMENT DUE PROCESS CLAIM ..... 24

II. THE FIFTH CIRCUIT'S LEGAL STANDARD IS CONSTITUTIONAL ..... 26

A. A SINGLE INCIDENT IS NOT "PUNISHMENT" UNDER THE EIGHTH AMENDMENT ..... 27

TABLE OF CONTENTS – Continued

Page

B. THE FIFTH CIRCUIT'S SIGNIFICANT INJURY STANDARD PROVIDES THE REQUIRED OBJECTIVE COMPONENT .. 31

III. PRISONER HUDSON DOES NOT HAVE AN EIGHTH AMENDMENT CLAIM, BUT MAY HAVE HAD A FOURTEENTH AMENDMENT DUE PROCESS CLAIM..... 40

IV. CONCLUSION ..... 44



TABLE OF AUTHORITIES

Page

CASES

*Adams v. State*, 247 So. 2d 149 (La. Ct. App. 1st Cir. 1971)..... 43

*Anderson v. Phelps*, 451 So. 2d 1284 (La. Ct. App. 1st Cir. 1984)..... 42

*Anderson v. City of Bessemer City*, 470 U.S. 564 (1985) .....9, 10

*Armstead v. Phelps*, 449 So. 2d 1049 (La. Ct. App. 1st Cir. 1984)..... 38

*Austin v. Parker*, 672 F.2d 508 (5th Cir. 1982) ..... 39

*Bastida v. State*, 269 So. 2d 544 (La. Ct. App. 1st Cir. 1972) ..... 43

*Bay v. Maggio*, 417 So. 2d 1386 (La. Ct. App. 1st Cir. 1982) ..... 43

*Betsch v. State*, 353 So. 2d 358 (La. Ct. App. 1st Cir. 1977), *writ denied*, 354 So. 2d 1380 (La. 1978)..... 43

*Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) ..... ii

*City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) ..... 14, 26, 33

*Craft v. State*, 308 So. 2d 290 (La. Ct. App. 1st Cir.), *writ denied*, 319 So. 2d 441 (La. 1975), *cert. denied*, 423 U.S. 1075 (1976)..... 43

*Daniels v. Williams*, 474 U.S. 327 (1986)...24, 25, 41, 42, 44

TABLE OF AUTHORITIES – Continued

Page

*Davidson v. Cannon*, 474 U.S. 344 (1986) . . 24, 25, 41, 42, 44

*Davis v. State*, 356 So. 2d 452 (La. Ct. App. 1st Cir. 1977) . . . . . 43

*Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) . . . . . 18

*Dudley v. Stubbs*, 489 U.S. 1034 (1989) . . . . . 20

*Estelle v. Gamble*, 429 U.S. 97 (1976) . . . . . *passim*

*G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) . . . . . ii

*George v. Evans*, 620 F.2d 495 (5th Cir. 1980) . . . . . 28, 29

*George v. Evans*, 633 F.2d 413 (5th Cir. 1980) . . . . . 18, 28, 29, 42

*Graham v. Connor*, 490 U.S. 386 (1989) . 18, 24, 34, 35, 41

*Gregg v. Georgia*, 428 U.S. 153 (1976) . . . . . 16

*Hampton v. State*, 361 So. 2d 257 (La. Ct. App. 1st Cir. 1978) . . . . . 43

*Hudson v. McMillian*, 929 F.2d 1014 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 1579 (1991) . . . . . 19, 27

*Hudson v. Palmer*, 468 U.S. 517 (1984) . . . . . 25, 41, 44

*Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990) . 8, 19, 27

*Ingraham v. Wright*, 430 U.S. 651 (1977) . . . 15, 24, 41, 42, 44

*International Harvester Credit Corp. v. Seale*, 518 So. 2d 1039 (La. 1988) . . . . . 40

*Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973) . . . . . 18, 30, 42



TABLE OF AUTHORITIES – Continued

Page

*Jones v. State*, 346 So. 2d 807 (La. Ct. App. 1st Cir.), *writ refused*, 350 So. 2d 671 (La. 1977) . . . . . 43

*Lewis v. Listi*, 377 So. 2d 551 (La. Ct. App. 3d Cir. 1979) . . . . . 43

*Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) . . . . . 16

*Mack v. State*, 529 So. 2d 446 (La. Ct. App. 1st Cir.), *writ denied*, 533 So. 2d 359 (La. 1988) . . . . . 43

*McGee v. State*, 417 So. 2d 416 (La. Ct. App. 1st Cir.), *writ denied*, 420 So. 2d 981 (La. 1982) . . . . . 42

*Moresi v. Department of Wildlife and Fisheries*, 567 So. 2d 1081 (La. 1990) . . . . . 37, 38

*Neathery v. State*, 395 So. 2d 407 (La. Ct. App. 3d Cir. 1981) . . . . . 42

*Nedd v. State*, 281 So. 2d 131 (La. 1973), *cert. denied*, 415 U.S. 957 (1974) . . . . . 43

*Parker v. State*, 282 So. 2d 483 (La. 1973), *cert. denied*, 414 U.S. 1093 (1973) . . . . . 42

*Parratt v. Taylor*, 451 U.S. 527 (1981) . . . . . 25, 41, 44

*Raney v. State*, 322 So. 2d 890 (La. Ct. App. 1st Cir. 1975) . . . . . 43

*Rhodes v. Chapman*, 452 U.S. 337 (1981) . . . . . 16, 21, 35, 37

*Robinson v. California*, 370 U.S. 660 (1962) . . . . . 16, 36

*Rummel v. Estelle*, 445 U.S. 263 (1980) . . . . . 35

*Shields v. State Through Dep't of Corrections*, 380 So. 2d 123 (La. Ct. App. 1st Cir. 1979), *writ denied*, 382 So. 2d 164 (La. 1980) . . . . . 43

TABLE OF AUTHORITIES – Continued

Page

*St. Julian v. State*, 98 So. 2d 284 (La. Ct. App. 1st Cir. 1957) ..... 43

*Thorne v. Jones*, 585 F. Supp. 910 (M.D. La. 1984), *reversed in part*, 765 F.2d 1270 (5th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) ..... 4

*Trop v. Dulles*, 356 U.S. 86 (1958) ..... 16

*U.S. v. Muniz*, 374 U.S. 150 (1963) ..... 38

*U.S. v. New York Telephone Co.*, 434 U.S. 159 (1977) ..... 15, 25, 26

*Walden v. State*, 430 So. 2d 1224 (La. Ct. App. 1st Cir. 1983), *writ denied*, 435 So. 2d 430 (La. 1983) .... 43

*Walker v. State*, 346 So. 2d 794 (La. Ct. App. 1st Cir.), *writ denied*, 349 So. 2d 879 (La. 1977) ..... 43

*Watts v. Phelps*, 377 So. 2d 1317 (La. Ct. App. 1st Cir. 1979), *writ denied*, 380 So. 2d 1210 (La. 1980) .... 38

*Weems v. United States*, 217 U.S. 349 (1910) ..... 16

*West v. Atkins*, 487 U.S. 42 (1988) ..... 17

*White v. Phelps*, 387 So. 2d 1188 (La. Ct. App. 1st Cir. 1980) ..... 43

*Whitley v. Albers*, 475 U.S. 312 (1986) ..... *passim*

*Williams v. State*, 351 So. 2d 1273 (La. Ct. App. 1st Cir. 1977) ..... 43

*Wilson v. Garcia*, 471 U.S. 261 (1985) ..... 38

*Wilson v. Seiter*, 111 S. Ct. 2321 (1991) ..... *passim*



TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES

U.S. Constitution, Amendment VIII and Amendment XIV ..... *passim*

28 U.S.C. 636(c), 28 U.S.C. 1915, and 42 U.S.C. 1983 ..... 4, 38, 39, 40

Louisiana Civil Code Article 2315 ..... 2

Louisiana Constitution (1974) Article 1, § 3, § 12 and § 20 ..... 2, 3, 37

Louisiana Revised Statutes 14:33-39, and 15:828 3, 4, 39

OTHER

Annual Report of the Director of the Administrative Office of the United States Courts (1989) ..... 15

No. 90-6531

In The

# Supreme Court of the United States

October Term, 1991

KEITH HUDSON,

*Petitioner,*

versus

JACK MCMILLIAN, CSO II, MARVIN WOODS, CSO II, AND ARTHUR MEZO, LIEUTENANT,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF RESPONDENTS

MAY IT PLEASE THE COURT:

The instant civil case is before This Court on a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. For reasons stated below, the respondents, Jack McMillian, Correctional Security Officer II, Marvin Woods, Correctional Security Officer II, and Arthur Mezo, Correctional Security Lieutenant, respectfully urge This Court to affirm the holding of the Fifth Circuit.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth Amendment to the Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

and § 1 of the Fourteenth Amendment, which reads in part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

and implicates certain laws of the State of Louisiana, including Article 2315 of the Louisiana Civil Code, which reads in part:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

and parts of the Louisiana Constitution (1974), which provide:

> [Right to Individual Dignity]. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime. [Article 1, § 3]
>
> [Freedom from Discrimination]. In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition. [Article 1, § 12]
>
> [Right to Humane Treatment]. No law shall subject any person . . . to torture, or to cruel, excessive, or unusual punishment. [Article 1, § 20, in pertinent part]



and of the following Louisiana Revised Statutes:

> Battery is the intentional use of force or violence upon another. . . . [Title 14, § 33, in pertinent part]
>
> Aggravated battery is a battery committed with a dangerous weapon. [Title 14, § 34, in pertinent part]
>
> Second degree battery is a battery committed without the consent of the victim when the offender intentionally inflicts serious bodily injury.
>
> For purposes of this article, serious bodily injury means bodily injury which involves unconsciousness, extreme physical pain, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death. [Title 14, § 34.1, in pertinent part]
>
> Simple battery is a battery committed without the consent of the victim. [Title 14, § 35, in pertinent part]
>
> Assault is an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery. [Title 14, § 36]
>
> Aggravated assault is an assault committed with a dangerous weapon. [Title 14, § 37, in pertinent part]

Simple assault is an assault committed without a dangerous weapon. [Title 14, § 38, in pertinent part]

Negligent injury is the inflicting of any injury upon the person of another by criminal negligence. [Title 14, § 39, in pertinent part]

Persons committed to the institutional care of the [Department of Corrections] shall be treated in a humane manner. . . . [Title 15, § 828, in pertinent part]

## STATEMENT OF THE CASE

The petitioner, Keith Hudson (Prisoner Hudson), was at the time of the incident and still is a prisoner of the State of Louisiana, confined at Louisiana State Penitentiary (L.S.P.)[2] for an armed robbery conviction (Tr. 76).[3] He filed suit pro se in the United States District Court for the Middle District of Louisiana *in forma pauperis* under 28 U.S.C. § 1915. Prisoner Hudson presumably brought suit under 42 U.S.C. § 1983 against the respondents, Jack McMillian, Corrections Security Officer II (CSO McMillian), Marvin Woods, CSO II (CSO Woods),

[2] L.S.P. is Louisiana's maximum-security prison housing the State's most violent and disruptive prisoners, and is also this country's largest maximum-security prison. *See Thorne v. Jones*, 585 F. Supp. 910, 912 (M.D. La. 1984), *rev'd in part*, 765 F.2d 1270, 1271 (5th Cir. 1985), *writ denied*, 475 U.S. 1016 (1986). Camp J, the camp at L.S.P. in which Prisoner Hudson was housed, is L.S.P.'s disciplinary camp housing L.S.P.'s most disruptive prisoners in single-cell confinement (Tr. 97-98).

[3] References to the Trial Transcript will be "Tr.___" and references to the Joint Appendix will be "J.A.___".



and Arthur Mezo, Lieutenant (Lt. Mezo), all state corrections security officers. The complaint alleged violations of the Constitution as the result of an incident on October 30, 1983, at Camp J of L.S.P. Prisoner Hudson prayed for injunctive relief and retrospective damages in the amount of $50,000 for physical, mental, and emotional anguish because of an alleged unjust and unnecessary beating (J.A. 2-8).

With the parties' consent under 28 U.S.C. § 636(c), the case was tried before a magistrate on March 10, 1987. The magistrate found in favor of Prisoner Hudson on his Eighth Amendment claim of excessive force, and against CSO McMillian, CSO Woods, and Lt. Mezo, awarding Prisoner Hudson $800 in retrospective money damages, but dismissing all other claims. The opinion of the District Court is unreported (J.A. 19-29).

CSO McMillian, CSO Woods, and Lt. Mezo appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit vacated the judgment of the District Court because Prisoner Hudson had not proved a "significant injury" (J.A. 30-33). The opinion of the Fifth Circuit is now reported at 929 F.2d 1014. Prisoner Hudson pro se filed a petition for a writ of certiorari, which This Court granted. This Court later appointed counsel for Prisoner Hudson and set out the specific question to be reviewed.

At the trial on the merits, in Prisoner Hudson's case-in-chief, Prisoner Hudson, along with fellow prisoners Edward Allen and Earl Truvia, testified (Tr. 11-84). Testifying in the case-in-chief of CSO's McMillian and Woods and Lt. Mezo were CSO Woods, Correctional Security Captain Jimmy Cole, Correctional Security Lieutenant

Gary Dubroc, and Medical Technician David Lemoine (Tr. 88-137). CSO's McMillian and Woods and Lt. Mezo introduced six exhibits during the trial on the merits (J.A. 9-18), and moved at the appropriate times for dismissal of Prisoner Hudson's suit (Tr. 85-87, 139-40, 145-47). Prisoner Hudson called Medical Technician Lemoine and Captain Cole in his case-in-rebuttal (Tr. 140-45).

Following a review of the evidence (J.A. 20-26), the District Court made the following findings of fact:

> Based on the credibility of the witnesses, the contemporaneous complaint to Kelone (Exhibit D-1), the sick call sheet (Exhibit D-5) and the testimony of the plaintiff, Allen and Truvia, the court finds that defendants Woods and McMillian used force on the plaintiff when there was no need to use any force at all, and that Mezo expressly condoned the use of force in this instance.
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> The court further finds that the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable for three to four months. During this time the plaintiff suffered no harm or medically adverse consequences due to the broken plate.
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> Plaintiff's injuries from the beating were minor and required no medical attention. They healed naturally without medical intervention. Plaintiff was seen by a medical specialist two days after the incident who observed no serious injuries and who felt no treatment was necessary. [J.A. 26]

The District Court, based on its review of applicable law, dismissed all of Prisoner Hudson's Constitutional



claims (J.A. 28), except his Eighth Amendment cruel and unusual punishment claim arising out of the allegations that CSO's McMillian and Woods in the early morning hours of October 30, 1983, while escorting Prisoner Hudson in full restraints from his single-man cell on Cuda-1-right to Administrative Lockdown, both in Camp J, hit and kicked Prisoner Hudson while Lt. Mezo watched. Under this Constitutional claim the District Court, in accepting the allegations of Prisoner Hudson and his witnesses, determined as a matter of law that:

> Here there was no need to use any force since the plaintiff was already in restraints. Since the plaintiff was harmed, the only explanation for it is the unnecessary use of force by Woods and McMillian. Mezo did not actually strike the plaintiff, but the credible testimony is that he was present, and in a position to stop Woods and McMillian, but instead acted only to temper their actions. This was an explicit approval of at least a limited beating. The defendants' conduct can only be seen as motivated by malice. All the defendants, by their acts of commission and omission, violated the plaintiff's rights under the Eighth Amendment by the use of unnecessary and excessive force. [J.A. 27-28]

The trial court determined that Prisoner Hudson had established that he had sustained only minor injuries resulting from the conduct of CSO's McMillian and Woods and Lt. Mezo, and the District Court awarded Prisoner Hudson $800.00 to compensate for his injuries (J.A. 28-29).

CSO's McMillian and Woods and Lt. Mezo appealed the judgment to the Fifth Circuit raising as errors the following:

1. Whether the District Court erred in holding appellee-inmate Hudson and his inmate witnesses were more credible than the defendants and their witnesses, and documented exhibits?

2. Whether the District Court erred in holding that defendants violated appellee's constitutional rights where the evidence establish[ed] at most that appellee was complaining of single isolated incident, and the evidence establish[ed] that such action, even if it happened, would not be authorized by prison officials for a penal or disciplinary purpose, and appellee had adequate remedy at State law?[4]

*See* the brief of CSO's McMillian and Woods and Lt. Mezo in the Fifth Circuit at vii.

The Fifth Circuit determined as a matter of fact that:

> The evidence reflects that on October 30, 1983 Hudson got into an argument with McMillian who punched Hudson in the mouth, eyes, chest and stomach while Woods held him. The blows cracked Hudson's partial dental plate, split his lower lip and loosened his teeth. He received bruises to his body but no other cuts. Woods kicked Hudson on his backside. Mezo, the supervisor of McMillian and Woods, watched the beating but merely cautioned the officers not to "have too much fun." [J.A. 31]

In applying the facts as found by the District Court to the Fifth Circuit's legal standard as set out in *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990), for Eighth Amendment claims arising out of allegations of use of excessive

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[4] CSO's McMillian and Woods and Lt. Mezo moved for involuntary dismissal in the District Court on the same grounds (Tr. 85-87, 139-40, and 145-47).



and unnecessary force on prisoners by correctional officers, the Fifth Circuit reversed the judgment of the District Court. Under that legal standard, the Fifth Circuit looks for the following factors in order to determine whether the Eighth Amendment's Cruel and Unusual Punishment Clause has been violated:

1. a significant injury, which
2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
3. objectively unreasonable, and
4. the action constituted an unnecessary and wanton infliction of pain. [J.A. 32]

Under this legal standard the Fifth Circuit concluded that, based on the fact findings of the District Court, Prisoner Hudson's injuries were not sufficient to meet the "significant injury" factor of their legal standard for this kind of Eighth Amendment claim (J.A. 32-33).

The judgment of the Fifth Circuit was entered on July 31, 1990. Following the denial of a timely petition for rehearing, Prisoner Hudson filed a petition for a writ of certiorari with This Court. On April 15, 1991, This Court granted Prisoner Hudson's petition with leave to proceed *in forma pauperis*. This Court on April 29, 1991, appointed counsel for Prisoner Hudson and amended its order of April 15, 1991, by setting out a specific question for review.

CSO's McMillian and Woods and Lt. Mezo, through their counsel, accept that they are now saddled with the findings of fact by the District Court and the approval of those factual findings by the Fifth Circuit. *See Anderson v.*

*City of Bessemer City*, 470 U.S. 564, 575 (1985). The reason that CSO's McMillian and Woods presented at trial no justification for their alleged use of physical force on Prisoner Hudson, and that Lt. Mezo presented no reason for his not stopping the alleged use of force, was not because there was no justification, but rather because they denied that any force was used on Prisoner Hudson at all (J.A. 25). CSO's McMillian and Woods and Lt. Mezo, through their counsel, still deny that force was used on Prisoner Hudson during the early hours of October 30, 1983.[5]

It is also clear from the record in this case that the State of Louisiana and the prison administration at L.S.P.

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[5] The record in this case is replete with contradictions in regard to evidence presented by Prisoner Hudson that he was hit nine to ten times by CSO McMillian while being held by CSO Woods in the walkway between Cuda 1-2 and Cuda 3-4, or that CSO Woods kicked him in the rear while Lt. Mezo told them not to "have too much fun." For example, Prisoner Truvia, who testified to hearing the beating, was not even housed in the Cuda Unit (Tr. 49). Prisoner Allen could only testify that he thought he heard "licks being passed." Prisoner Allen testified, however, that he heard a beating that he claims occurred in the lobby of Cuda 1 (Tr. 32). Prisoner Hudson claims that the beating took place in the walkway between Cuda 1-2 and Cuda 3-4 (Tr. 57). While Exhibit D-5 indicates that Prisoner Hudson had a dental complaint on November 1, 1983, J.A. 5, Medical Technician Lemoine testified that Prisoner Hudson had made dental complaints for several months prior to October 30, 1983, and had received an appointment to see a dentist prior to November 1, 1983 (Tr. 128-29). The statements contained in Exhibit D-5, J.A. 9, conflict with Prisoner Hudson's allegations in his complaint, J.A. 5-7, and his testimony at trial (Tr. 55-84).



do not condone nor tolerate the type of conduct complained of by Prisoner Hudson (J.A. 23; Tr. 90 & 95-96). It is equally clear that CSO's McMillian and Woods and Lt. Mezo do not make prison policy but have authority only to carry it out. CSO's McMillian and Woods and Lt. Mezo are line officers and not high-ranking prison officials at L.S.P.[6] (J.A. 9-10, 13-14 & 16-18; the Major at Camp J was Davy Kelone). The alleged conduct that occurred between Prisoner Hudson and CSO's McMillian and Woods and Lt. Mezo can be characterized as a personal dispute.[7]

The parties before This Court, including those appearing as amici curiae, must accept the findings of fact in the courts below. CSO's McMillian and Woods and Lt. Mezo assert, through their counsel, that just as the lower court's fact finding of an incident is binding on them, the fact-finding that Prisoner Hudson suffered only "minor injuries" is binding on Prisoner Hudson. The injury found by the District Court as a matter of fact was "minor bruises and swelling to the plaintiff's face, mouth

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[6] Contrary to the unsupported assertion of the Solicitor General, see the amicus curiae brief of the Solicitor General at 7 n.1., Lt. Mezo does not possess the authority to mete out punishment on behalf of the State of Louisiana or L.S.P. In fact, even Prisoner Hudson admits that the action or inaction was contrary to L.S.P.'s policy and practice (Tr. 62).

[7] Just prior to the use of physical force, CSO's McMillian and Woods and Lt. Mezo had had a heated verbal exchange with Prisoner Hudson (Tr. 55-56; J.A. 11-12 & 20-21). CSO's McMillian and Woods and Lt. Mezo once again, however, deny that they used any physical force on Prisoner Hudson in the early morning hours of October 30, 1983.

and lip, and also damag[e to] his partial [dental] plate."[8] No medical treatment was necessary and no other adverse consequences occurred (J.A. 26). Under the law as applied to these findings of fact the Fifth Circuit determined that a significant injury had not been inflicted (J.A. 31-33).

## SUMMARY OF ARGUMENT

When a prisoner complains of his conditions of confinement, a court must look first to the primary source of constitutional protection, the Eighth Amendment's Cruel and Unusual Punishment Clause. If relief is not afforded under that clause, a prisoner may have a remedy under the Fourteenth Amendment's substantive due process, but only in the absence of adequate state relief.

The Eighth Amendment's Cruel and Unusual Punishment Clause has two standards, one for challenges to sentences and one for challenges to conditions of confinement. The standard for a challenge to conditions of confinement, as in this case, has separate objective and subjective components. The objective component asks whether the deprivation is sufficiently serious to warrant Eighth Amendment protection, and the subjective component inquires into the prison official's state of mind. It is the objective component alone that is at issue in this case.

[8] The damage to Prisoner Hudson's partial dental plate is damage to property and not to the person, and will not hereinafter be considered as part of the physical injuries received.



Prisoner Hudson's claim does not properly fall under the Eighth Amendment because it is not "punishment." Instead it is essentially a personal dispute between a prisoner and lower-ranking correctional personnel. If it does fall under the Eighth Amendment, the Fifth Circuit's significant-injury standard provides for the objective component in a fair, practical, and constitutional fashion that is consistent with This Court's interpretation of the Eighth Amendment.

Prisoner Hudson may have had a claim under the Fourteenth Amendment. Because Louisiana provides for both pre-deprivation prohibitions and adequate post-deprivation remedies, the Due Process Clause has not been violated.

## ARGUMENT

### I. THE CONSTITUTIONAL FRAMEWORK

This case involves a claim by a state prisoner that state correctional security officers used unnecessary and excessive force. The courts below treated Prisoner Hudson's claim of unnecessary and excessive physical force solely under the Eighth Amendment's Cruel and Unusual Punishment Clause. The constitutional framework, however, may not be quite so simple.

#### A. THE EIGHTH AMENDMENT HAS DIFFERENT STANDARDS FOR CHALLENGES TO SENTENCES AND CHALLENGES TO CONDITIONS OF CONFINEMENT

The instant case presents This Court with the question of the proper legal standard to be applied under the

Eighth Amendment to an alleged single incident of force in a prison setting. It is this question that CSO's Jack McMillian, Marvin Woods, and Lt. Mezo will treat in this brief.[9]

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[9] The question accepted for review by This Court, as opposed to those posed by Prisoner Hudson and the United States in their briefs, encompasses the issue of whether a single incident of force on a prisoner constitutes punishment under the Eighth Amendment. Because single incident is in the question for review, it is also clearly before This Court. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1988). In fact, Prisoner Hudson's brief at 34-37 deals directly with the issue of a single incident.

Suits brought by a state prisoner pro se under 42 U.S.C. § 1983 for alleged constitutional deprivations by prison employees have increased dramatically over recent years. These cases, like the instant suit, do not involve prison practice or policy, but rather alleged actions by line personnel which if true are a violation of prison practices and policies, as well as of state law.

In fact it is precisely that issue that Prisoner Hudson's brief, the amicus curiae brief of Americans for Effective Law Enforcement, Inc., and the amicus curiae brief of Prisoners' Legal Service of New York deal with at length. It is the contentions in these briefs that if the Fifth Circuit's legal standard is adopted in this type of Eighth Amendment challenge, then prison officials will have no way of forcing their employees to operate within the rules established by the prison officials. According to these briefs, absent federal court intervention under the Eighth Amendment's Cruel and Unusual Punishment Clause, prison officials will have no means through which to prevent their employees from engaging in unauthorized acts of physical force on state prisoners. *See* Amicus Curiae brief of Americans for Effective Law Enforcement, Inc. at 4-5 and amicus curiae of Prisoner's Legal Services of New York at 19-25.

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This Court has determined that the purpose of the Eighth Amendment's Cruel and Unusual Punishment Clause is to "limit the power of those entrusted with the criminal law function of government." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). In other words, the Eighth Amendment prohibits the infliction, by the various

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A total of 214,308 suits classified as private civil-rights litigation were filed in federal courts from June 30, 1985, through 1989. Of this number 112,748 were filed by non-prisoners, while 101,415 were filed by prisoners. Prisoner suits during this period amounted to 47% of the total number of this type of filing. During this same period nonprisoner filings decreased by 1,413, while prisoner filings increased by 3,064. In 1985 prisoner filings composed 44% of these types of filings. In 1989 prisoner suits rose to 50% of this type of filing. *See Annual Report of the Director of the Administrative Office of the United States Courts* (1989) at 118, Table S-12. Based on those statistics the Solicitor General correctly asserts that "greater doctrinal clarity in this respect is of increasing practical importance in view of the substantial expansion in recent years in the number of cases of this sort."

These types of suits generally do not involve a challenge to the conditions of confinement imposed by state prison officials but rather an allegation that particular prison employees are not following the policies imposed on those prison employees by prison officials. The instant case presents just such a situation. The single unauthorized event by line security officers was raised as a defense in the District Court (Tr. 85-87, 139-40 and 145-47), and as error in the Fifth Circuit. *See* the brief of CSO's McMillian and Wood and Lt. Mezo in the Fifth Circuit at IV and 11-14. These are grounds for affirmance of the decision of the Fifth Circuit. It can be therefore considered by This Court. *See, United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) cited in *Whitley v. Albers*, 475 U.S. 313, 326 (1986).

governments in this country, of cruel and unusual punishments on convicted persons. *Wilson v. Seiter*, 111 S.Ct. 2321, 2323 (1991). The majority of This Court's decisions interpreting the prohibition against cruel and unusual punishment have examined the constitutionality of sentences imposed by courts.

This Court has also applied the Eighth Amendment's Cruel and Unusual Punishment Clause to "deprivations that were not specifically part of the sentence but were suffered during imprisonment" as a condition of confinement. *Id.*, 111 S.Ct. at 2323. As indicated by This Court, cases involving a criminal sentence imposed, and cases arising out of conditions of confinement, cannot be subjected to the same analysis under the Eighth Amendment's Cruel and Unusual Punishment Clause. *Id.*, 111 S.Ct. at 2326.[10] This case does

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[10] Examples of cases involving challenges under the Eighth Amendment to sentences imposed include *Weems v. United States*, 217 U.S. 349 (1910) (imposing a long prison sentence); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (subjecting a prisoner to the penalty of attempted execution more than once); *Trop v. Dulles*, 356 U.S. 86 (1958) (imposition of a sentence of deprivation of citizenship); *Robinson v. California*, 370 U.S. 660 (1962) (imposing a criminal sentence for being addicted to drugs); and *Gregg v. Georgia*, 428 U.S. 153 (1976) (involving the imposing of the death penalty). Examples of cases involving challenges under the Eighth Amendment to conditions of confinement include *Estelle v. Gamble*, 429 U.S. 97 (1976) (denial of medical care for serious medical needs); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (double-celling of prisoners); *Whitley v. Albers*, 475 U.S. 312 (1986) (orders by a high-ranking prison official to use deadly physical force to quell a riot); and *Wilson v. Seiter*, 111 S.Ct. 2321 (1991) (general conditions of confinement). These two types of challenges are not and cannot be subjected to the same legal standard under the Cruel and Unusual Punishment Clause. *Id.* 111 S.Ct. at 2323-25.



not involve an Eighth Amendment challenge to a sentence imposed by a court but rather a challenge to a condition of confinement.

Cases lodging challenges of cruel and unusual punishment to a criminal sentence never raise the questions of "Is it punishment?" or "Who is responsible?" Imposing a criminal sentence is always punishment within the meaning of the Eighth Amendment, and the entity that is responsible for the cruel and unusual punishment under this type of challenge is always the government that imposed the sentence.

Challenges to conditions of confinement, however, always raise the questions of "Is it punishment?" and "Who is responsible?" In conditions-of-confinement cases, "The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley v. Albers*, 475 U.S. 312, 320 (1986). The "kind of conduct" clearly involves not only "What occurred?" but "Who caused it?" For example, while deliberate indifference to a prisoner's serious medica' needs may constitute the "kind of conduct" proscribed by the Eighth Amendment's Cruel and Unusual Punishment Clause, *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), who is responsible for that "kind of conduct" must also be determined in order to find an Eighth Amendment violation. *See, e.g., West v. Atkins*, 487 U.S. 42, 58 (1988) (Scalia, J., concurring) ("I do not believe that a doctor who lacks supervisory or other penological duties can inflict punishment within the meaning of that term in the Eighth Amendment").

Authorization of the use of force on a prisoner by a high-ranking prison official may constitute the "kind of conduct" proscribed by the Eighth Amendment's Cruel and Unusual Punishment Clause, *Whitley v. Albers*, 475 U.S. 312, but an isolated assault by a corrections security officer is probably not the "kind of conduct" that falls within the meaning of "punishment" in the Eighth Amendment. *See George v. Evans*, 633 F.2d 413, 415 (5th Cir. 1980) ("An isolated assault by an individual guard on an inmate is not within the meaning of the Eighth Amendment, punishment."); *Johnson v. Glick*, 481 F.2d 1028, 1032 (2nd Cir.) ("[A]lthough a spontaneous attack by a guard is 'cruel' and we hope 'unusual,' it does not fit any ordinary concept of 'punishment.' "), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973); *cf. Graham v. Connor*, 490 U.S. 386, 392 n.6 (1989) (This Court noted the issue of whether such conduct is punishment); *but see, e.g., Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment, and 'cruel and unusual' because the Supreme Court has interpreted the term to forbid unauthorized . . . punishments."), *cert. denied*, 479 U.S. 816 (1986). In conditions-of-confinement challenges the questions of "Is it punishment?" and "Who is responsible?" must always be answered before a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause can be found.[11]

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[11] This conclusion is implicit in This Court's ruling in *Wilson v. Seiter*, 111 S.Ct. 2321. It is impossible to determine a culpable state of mind without first determining who is responsible for the conduct.



## B. IN EIGHTH AMENDMENT CHALLENGES TO CONDITIONS OF CONFINEMENT, THIS COURT REQUIRES BOTH OBJECTIVE AND SUBJECTIVE COMPONENTS.

It is now clear that, in challenging conditions of confinement under the Eighth Amendment's Cruel and Unusual Punishment Clause, the prisoner must prove the existence of both an objective and a subjective component before he can prevail.[12] The objective component inquires into the question of "Was the deprivation sufficiently serious?" while the subjective component inquires into the question of "Did the prison official act with a sufficiently culpable state of mind?" Both the objective and subjective components must be proved by the prisoner in order to prevail on an Eighth Amendment Cruel and Unusual Punishment claim arising out of the conditions of confinement. *See Wilson v. Seiter*, 111 S.Ct. at 2324.

The objective and subjective components are separate and distinct tests. Each component answers a separate

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[12] The standard established by the Fifth Circuit in *Huguet v. Barnett*, 900 F.2d 838, 841 (5th Cir. 1990) (decided on May 11, 1990), and applied in the instant case, *Hudson v. McMillian*, 929 F.2d 1014, 1015 (5th Cir. 1990) (decided on July 31, 1990), predates the legal standard set out by This Court in *Wilson v. Seiter*, 111 S.Ct. 2321 (decided on June 17, 1991). The legal standard set out by the Fifth Circuit for this type of Eighth Amendment challenge clearly includes distinct and separate objective and subjective components. The standard as set out by the Fifth Circuit in *Huguet* makes the objective component the threshold inquiry followed by an inquiry into the subjective component. Prisoner Hudson's claim was dismissed because he did not meet the threshold inquiry into the objective component (J.A. 32-33).

and distinct inquiry. The objective component determines whether the deprivation complained of is sufficiently serious to warrant protection under the Eighth Amendment's Cruel and Unusual Punishment Clause. The subjective component examines the state of mind of the prison official. *Id.*

The instant case does not present a dispute over the subjective component of the legal standard,[13] but over the

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[13] The subjective component is satisfied by a finding of wantonness, and the degree of wantonness is determined by the circumstances. If the circumstances require that the "actions are necessarily taken 'in haste, under pressure,' and balanced against 'competing institutional concerns for the safety of prison staff or other inmates,' " then the culpable state of mind is that of "acting 'maliciously and sadistically for the very purpose of causing harm,' " *Wilson v. Seiter*, 111 S.Ct. at 2326, citing *Whitley v. Albers*, 475 U.S. at 320-21. *See also Dudley v. Stubbs*, 489 U.S. 1034, 1037-38 (1989) (O'Connor, J., dissenting from denial of certiorari). However, when no balancing of important governmental responsibilities exists, the culpable state of mind is that of "deliberate indifference." *Wilson v. Seiter*, 111 S. Ct. at 2326, *citing Whitley v. Albers*, 475 U.S. at 320, and *Estelle v. Gamble*, 429 U.S. at 97. Currently those are the two degrees of wantonness that satisfy the subjective component.

In this case both the District Court, J.A. 28, and the Fifth Circuit, J.A. 32, determined that CSO McMillian, CSO Woods, and Lt. Mezo acted maliciously and sadistically. The subjective component is therefore not at issue. CSO's McMillian and Woods and Lt. Mezo again deny that they used any force on Prisoner Hudson, but acknowledge that, given the findings of fact by the District Court, the subjective component has been met.

It is possible that the "deliberate indifference" as opposed to the "malicious and sadistic" standard should be applied to

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objective component. The dispute is whether the result of the conduct complained of is "harmful enough to satisfy the objective component of an Eighth Amendment claim." *See id.*, 111 S.Ct. at 2326, citing *Whitley v. Albers*, 475 U.S. at 312, and *Rhodes v. Chapman*, 452 U.S. 337 (1981).

The objective component is the threshold inquiry in all challenges to conditions of confinement under the Eighth Amendment's Cruel and Unusual Punishment Clause. *Wilson v. Seiter*, 111 S.Ct. at 2328. In This Court the objective component has always required some form or degree of injury to the prisoner. In *Estelle v. Gamble*, for example, This Court required that a "serious medical need" exist before an Eighth Amendment claim could be raised. In *Whitley v. Albers*, a serious physical injury resulted from the use of authorized physical force. In *Wilson v. Seiter* and *Rhodes v. Chapman*, a deprivation of a necessity of life had to exist.[14]

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the type of conduct at issue in this case since no balancing of important governmental responsibilities existed. Prisoner Hudson concedes in his brief at 10 n.6, however, that the "malicious and sadistic" state of mind standard of *Whitley* rather than the "deliberate indifference" state of mind standard of *Estelle* applies to the instant case.

[14] It is not enough to deprive a prisoner of medical care; the deprivation of medical care must be directly linked to a *serious* medical need. *Estelle v. Gamble*, 429 U.S. at 104. Nor is it enough to deprive a prisoner of comfortable living conditions; the living conditions must cause a deprivation of life's necessities. *Wilson v. Seiter*, 111 S.Ct. at 2327, and *Rhodes v. Chapman*, 452 U.S. at 346.

In asserting that the degree of resulting injury is not a factor to be considered under an Eighth Amendment claim, Prisoner Hudson relies on decisions in which a sentence was challenged or in which This Court disapproved of a requirement of injury under the *subjective* component in challenges to conditions of confinement; he does not cite decisions addressing the injury requirement under the objective component of a challenge to a condition of confinement.[15] The use of the rationale from a sentencing case in a conditions-of-confinement case has been expressly disapproved by This Court. *Wilson v. Seiter*, 111 S.Ct. at 2326. In a condition-of-confinement case an injury standard is relevant to the objective component but not to the subjective.[16]

Under the objective component, the degree of injury is a major factor when the conduct complained of involves the use of physical force. In *Whitley*, for example, the injury that resulted was clearly serious since it involved shotgun blasts to the legs of a prisoner. *Whitley v. Albers*, 475 U.S. at 316. In fact, despite the protestations in his brief, Prisoner Hudson concedes that some level of physical injury to a prisoner is required in order to pass the threshold inquiry under the objective component in an Eighth Amendment challenge to conditions of confinement under the Cruel and Unusual Punishment Clause.[17]

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[15] Prisoner Hudson's brief at 9-25.

[16] As the subjective component deals with the state of mind of the actor, the amount of injury resulting does not matter. *See Wilson v. Seiter*, 111 S.Ct. at 2327-28.

[17] Prisoner Hudson agrees in his brief at 27 that not every "push or shove" states an Eighth Amendment claim. The

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This Court has made it clear in *Wilson v. Seiter* that the legal standard applied in a prisoner's challenge to conditions of confinement under the Eighth Amendment must contain separate and distinct objective and subjective components, *Wilson v. Seiter*, 111 S.Ct. at 2323-27. The Fifth Circuit's legal standard under challenge here provides for separate and distinct objective and subjective components.

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disagreement is over the extent of the injury, resulting from the "push or shove," that is needed to state an Eighth Amendment claim. The Solicitor General also concedes in his amicus curiae brief at 9-11 that the extent of the injury resulting from the "push or shove" must be a factor in these types of cases.

What both Prisoner Hudson and the Solicitor General ignore is that This Court has in *Wilson v. Seiter* established a threshold objective component that inquires into the seriousness of the deprivation. Both Prisoner Hudson and the Solicitor General are in effect requesting that This Court reverse itself in this case by eliminating the objective component. An earlier attempt by the Solicitor General and counsel for Prisoner Hudson to have This Court eliminate the subjective component was rejected in *Wilson v. Seiter*, 111 S.Ct. 2321. Their attempt in this case to have This Court eliminate the objective component should also be soundly rejected, particularly as both counsel for Prisoner Hudson and the Solicitor General have conceded that some degree of injury should be required. Prisoner Hudson was simply unable to prove that his physicial injuries were significant (J.A. 26, 28-29 & 30-31).

### C. A PRISONER WHO DOES NOT HAVE AN EIGHTH AMENDMENT CLAIM MAY HAVE A FOURTEENTH AMENDMENT DUE PROCESS CLAIM.

This Court has recently stated that when a prisoner challenges his conditions of confinement "the primary source of substantive protection" under the Constitution is the Eighth Amendment's Cruel and Unusual Punishment Clause. *Whitley v. Albers*, 475 U.S. at 327. Such claims, however, may also state a violation of substantive due process under the Fourteenth Amendment. *See Graham v. Connor*, 490 U.S. at 395 n.10, citing *Whitley v. Albers*, 475 U.S. at 327.[18] When the state has pre-deprivation proscriptions against such conduct and adequate post-deprivation remedies for engaging in such conduct, a violation of the Due Process Clause does not occur. If the state does not provide pre-deprivation guidelines and adequate post-deprivation remedies, however, intentional misconduct by its employees may be remedied under the Due Process Clause of the Fourteenth Amendment.[19]

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[18] Substantive due process affords free citizens, pretrial detainees, and convicted felons protection from excessive force by agents of the government who are acting on behalf of the government. *See Graham v. Connor*, 490 U.S. at 395 n.10. Just as the Due Process Clause of the Fourteenth Amendment protects public-school children from excessive force by school personnel, *Ingraham v. Wright*, 430 U.S. 651, 672-82 (1977), substantive due process protects a prisoner from being subjected to an intentional infliction of bodily injury by prison employees. *See Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986).

[19] This is clearly the lesson to be learned in *Ingraham v. Wright*, 430 U.S. at 672-82. This principle is also made clear

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Therefore, if Prisoner Hudson does not have a claim under the Eighth Amendment's Cruel and Unusual Punishment Clause arising out of this alleged single and unauthorized use of physical force by CSO McMillian, CSO Woods, and Lt. Mezo, he may have had a claim under the Due Process Clause of the Fourteenth Amendment, which provides prisoners with constitutional protection from injuries intentionally inflicted upon them by prison employees.[20] The application of this Eighth

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through a reading of *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984), *Davidson v. Cannon*, 474 U.S. 344 (1986), and *Daniels v. Williams*, 474 U.S. 327 (1986).

[20] While the legal standard under the Eighth Amendment's Cruel and Unusual Punishment Clause and substantive due process under the Fourteenth Amendment's Due Process Clause are redundant, *Whitley v. Albers*, 475 U.S. at 327, they are not identical. The Eighth Amendment is the primary source but not the exclusive constitutional remedy. The distinction appears to be that the Eighth Amendment prohibits punishments, while the Fourteenth Amendment prohibits intentional deprivations that are without due process of law. Thus Prisoner Hudson's lament in his brief, that approval of the Fifth Circuit's legal standard under this type of Eighth Amendment case would leave prison personnel free to inflict all kinds of pain without injury, is baseless. The prisoner may resort to the Due Process Clause if the state does not provide pre-deprivation proscriptions or guidelines and adequate post-deprivation remedies.

While this ground for affirmance is not properly within the question posed by This Court, it was raised in the District Court and in the Court of Appeal. *See* the brief of CSO's McMillian and Woods and Lt. Mezo in the Fifth Circuit at vii and 11-14. This ground may therefore be considered as a basis for affirming the decision of the Fifth Circuit. *See United States*

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Amendment framework to Prisoner Hudson's claim that CSO's McMillian and Woods and Lt. Mezo used unauthorized excessive physical force on him in violation of his constitutional rights leads to the conclusion that the opinion of the Fifth Circuit should be affirmed.

## II. THE FIFTH CIRCUIT'S LEGAL STANDARD IS CONSTITUTIONAL

The conduct complained of by Prisoner Hudson is that CSO McMillian and CSO Woods in the early morning hours of October 30, 1983, used unauthorized and unjustified physical force on him while he was being moved in full restraints from one single-man cell to another, and that Lt. Mezo not only did nothing to stop the unauthorized and unjustified use of physical force, but in fact, encouraged it. As a result of the use of unauthorized and unjustified physical force Prisoner Hudson received a fat lip and other minor bruises (J.A.26 and 31-33).[21] It is with this kind of conduct in mind that This Court must review the legal standard that the Fifth Circuit applied to Prisoner Hudson's challenge to his condition of confinement under the Eighth Amendment's

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*v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977), cited in *Whitley v. Albers*, 475 U.S. at 326; *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

[21] Just as CSO's McMillian and Wood and Lt. Mezo are now saddled with the factual finding in the courts below that they applied unjustified physical force to Prisoner Hudson, Prisoner Hudson is saddled with the finding of fact in the courts below that his injuries were minor at most.



Cruel and Unusual Punishment Clause. *See Whitley v. Albers*, 475 U.S. at 320. The Fifth Circuit's legal standard requires: (1) a significant injury which (2) resulted directly and only from the use of force that was clearly excessive to the need, (3) the excessiveness of which was objectively unreasonable, and (4) the action constituted an unnecessary and wanton infliction of pain. *Huguet v. Barnett*, 900 F.2d 838, 841 (5th Cir. 1990), and *Hudson v. McMillian*, 929 F.2d 1014, 1015 (5th Cir. 1990).

The legal standard used by the Fifth Circuit provides for an inquiry into both the objective and subjective components of an Eighth Amendment claim of cruel and unusual punishment arising out of conditions of confinement involving the use of physical force on a state prisoner. The factor of "significant injury that results from the use of physical force" provides the objective component; the factors of "excessive to the need" and "unreasonable" provide the subjective component. Both components are now required by This Court when this type of challenge is raised under the Eighth Amendment. *See Wilson v. Seiter*, 111 S.Ct. at 2323-28.[22] Prisoner Hudson's contention, that the objective component in the Fifth Circuit's legal standard for this kind of conduct is not constitutionally permissible, is incorrect and ill-founded.

### A. A SINGLE INCIDENT IS NOT "PUNISHMENT" UNDER THE EIGHTH AMENDMENT

The alleged conduct of which CSO McMillian, CSO Woods, and Lt. Mezo were accused in this case was not a

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[22] The subjective component of the Fifth Circuit's legal standard is, by admission of Prisoner Hudson in his brief at 10 n.6, not being questioned.

part of Prisoner Hudson's sentence, served no penal purpose, and was not approved by higher prison officials. On the contrary, the undisputed testimony was that such conduct was against the rules of the prison and was grounds for disciplinary action against CSO's McMillian and Woods and Lt. Mezo, including dismissal (J.A. 23; Tr. 90 & 95-96). As alleged, it was essentially a personal dispute between correctional security officers and a prisoner, outside of, unforeseeable by, and strongly disapproved by higher officials of the prison.

Prisoner Hudson's brief relies heavily on the trial judge's footnote that this was not an "isolated incident that would arguably be outside of the Eighth Amendment," citing *George v. Evans* (J.A. 27).[23] While the judge was correct that an isolated and unauthorized incident would be outside of the Eighth Amendment, CSO's McMillian and Woods and Lt. Mezo respectfully suggest that the trial judge misinterpreted *George v. Evans*. Punishment, as correctly defined by *George v. Evans*, is action by guards, applied for a penal or disciplinary purpose, and authorized by high prison officials. It is distinguished from an isolated and unauthorized incident: "An isolated assault by individual guards on an inmate is not . . . punishment."[24]

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[23] Aside from the fact that the trial judge's statement is an opinion of law and not a finding of fact, the question of an isolated incident *is* before This Court because This Court has so ordered. Prisoner Hudson's revision of This Court's question is of no avail.

[24] *George v. Evans*, 633 F.2d 413, 415 (5th Cir. 1980). The magistrate's reliance below on *George v. Evans*, 620 F.2d 495

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*George v. Evans* does not distinguish punishment from an isolated and unauthorized incident by looking to see if the excessive force was repeated in the course of a single incident, as the trial judge apparently believed, but by looking to see whether the excessive force was a part of an essentially personal dispute between a prisoner and correctional security officers, outside of any regular penal activity of the prison. The Eighth Amendment prohibits "punishment" only, and a prisoner must look to other remedies – administrative, state, and federal – for an isolated and unauthorized incident.

The Fifth Circuit decided the appeal on other grounds, and the absence of discussion of the isolated-incident question is therefore of no significance, contrary to Prisoner Hudson's suggestion in his brief at 33 and fn. 32. Other courts have considered the question, however, at least implicitly, and Prisoner Hudson's statement, that This Court has never required proof of more than an isolated and unauthorized incident in an Eighth Amendment case, is not correct. *Estelle v. Gamble* and other medical-indifference cases typically involve a course of indifference, done with at least the implicit approval of higher prison officials. *Whitley v. Albers* was a single incident but done with the approval and participation of

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(5th Cir. 1980), J.A. 27, was misplaced because that decision was withdrawn and replaced by *George v. Evans*, 633 F.2d 413 (5th Cir. 1980).

a high ranking prison official in the course of quelling a riot. *Id.*, 475 U.S. at 315-16.

Prisoner Hudson tries to equate "single incident" with a single act, whereas under the Eighth Amendment "single incident" is essentially a term of art, with a special meaning that serves to define the boundaries of "punishment" in the Eighth Amendment. *Wilson v. Seiter* and other prison-conditions cases involve prevailing and continuing conditions, done with the approval of prison officials; a "single incident" is an act that serves no penal purpose and is done without the authorization of high prison officials, basically a personal dispute between a correctional security officer and a prisoner. In fact Prisoner Hudson's reliance on *Hutto v. Finney*, 437 U.S. 678 (1973), defeats his bold assertions that "single incident" is legally immaterial. The activities complained of in *Hutto* were specifically approved and authorized by high-ranking prison officials, *id.*, 437 U.S. at 682 nn.4-5, and do not constitute a "single incident."

"The thread common to all [Eighth Amendment prison cases] is that 'punishment' has been deliberately administered for a penal or disciplinary purpose." *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973), quoted in *Wilson v. Seiter*, 111 S.Ct. at 2325. "[A]lthough a spontaneous attack by a guard is 'cruel' and . . . 'unusual,' it does not fit any ordinary concept of 'punishment.' " *Id.*, 481 F.2d at 1032. Punishment is administered for a penal or disciplinary purpose with the apparent authorization of high prison officials charged by the state with the responsibility for care of prisoners. *Id.*



This case does not present even the question whether the action was implicitly approved or tolerated by prison officials' turning a blind eye to the action. The undisputed testimony is that the alleged conduct, if true, was contrary to prison regulations and subject to severe disciplinary action by prison officials (Tr. 90 & 95-96) – a textbook example of an isolated and unauthorized incident. Prisoner Hudson alleges that, after a heated exchange with CSO McMillian and Woods and Lt. Mezo, they took him aside and vented their anger on him physically (Tr. 55-56; J.A. 11-12 & 20-21). Their action as alleged was an unpremeditated resolution of a personal dispute, outside of and disapproved by any penal activity of the prison, "unforeseen and unforeseeable by higher authority." *Johnson v. Glick*, 481 F.2d at 1034.[25]

### B. THE FIFTH CIRCUIT'S SIGNIFICANT INJURY STANDARD PROVIDES THE REQUIRED OBJECTIVE COMPONENT.

In Eighth Amendment challenges by prisoners to their conditions of confinement "due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged" must be given in setting any legal standard. *Whitley v. Albers*, 475 U.S. at 320, cited with approval in *Wilson v. Seiter*, 111 S.Ct. at 2326. This

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[25] The conduct complained of by Prisoner Hudson is not "punishment" within the Eighth Amendment's Cruel and Unusual Punishment Clause because, if it occurred in the manner accepted by the trial court, it was an act of private revenge rather than an action taken on behalf of the State of Louisiana through its prison officials.

case involves a claim of excessive and unnecessary use of physical force and the use of significant injury as the objective component is clearly appropriate. As pointed out by This Court in *Wilson v. Seiter*, "*Whitley* teaches that, *assuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim*, whether it can be characterized as "wanton" depends upon the constraints facing the official." *Wilson v. Seiter*, 111 S.Ct. at 2326 (emphasis added).

While the extent of the injury received by a prisoner cannot be used to determine the "wantonness" of the conduct of the prison official (the subjective component), *Wilson v. Seiter*, 111 S.Ct. at 2323-24, it is the logical threshold test of the seriousness of the deprivation in an excessive-force case (the objective component). Unless every unpermitted touching in a prison setting is to be called an Eighth Amendment violation, some degree of injury must be the direct result of touching. Even Prisoner Hudson in his brief admits that some degree of injury that resulted directly from the touching must be present in order for a prisoner to bring an Eighth Amendment claim based on excessive force. His objection is not so much that the injury requirement is inappropriate as that the particular facts of this case met the requirement of that threshold inquiry.[26]

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[26] *See* Prisoner Hudson's brief at 27 n.23. This same admission is made by the United States' amicus curiae brief at 9-11. Both Prisoner Hudson and the Solicitor General are merely objecting to the findings of fact in the courts below in this case, contending that Prisoner Hudson's injuries are significant. They are not here disputing that "significant injury" should be the objective factor.



This Court has recognized the importance of distinguishing state-law torts from "constitutional torts" (constitutional deprivations actionable under § 1983). Like the Fourteenth Amendment, the Eighth Amendment should not become "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting the contention that the Due Process Clause should extend a right wherever the state may be characterized as a tortfeasor).[27] In *Estelle v. Gamble* This Court said, "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." 429 U.S. 97, 106 (1976).

Likewise, other torts do not become constitutional violations merely because the defendant is a state official: "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles." *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (false imprisonment). "[T]his court has never held that every instance of use of 'unreasonable force' in effecting an arrest constitutes a violation of the Fourth Amendment. . . . " *City of Oklahoma v. Tuttle*, 471 U.S. 808, 817 n.4 (1985). The famous statement that "not every

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[27] Nor can § 1983 be used for that purpose. *See City of Oklahoma v. Tuttle*, 471 U.S. 808, 816 (1985) (plurality opinion of Rehnquist, C.J., White, J., and O'Connor, J.) ("By its terms, of course, [§ 1983] creates no substantive rights.").

push or shove" violates the Eighth Amendment, most recently repeated by This Court in *Graham v. Connor*, 490 U.S. 396 (1989), may be sharply distinguished from the state-law tort of battery, typically any unpermitted touching.[28]

Prisoner Hudson's brief acknowledges that there are subconstitutional deprivations, for example, "truly *de minimis* inflictions of pain or other injury may not violate the Eighth Amendment. . . . " (Prisoner Hudson's brief at p.7 n.4, his emphasis); "*Estelle* [*v. Gamble*] certainly contemplates that some medical needs are so trivial that the failure to treat them is not of constitutional import." (p.11 n.8); and "[p]etitioner agrees that not every 'push or shove' states an Eighth Amendment claim." (p.15 n.23).[29]

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[28] For example, the tort of battery in Louisiana is any intentional, unpermitted, and unprovoked contact with the plaintiff's person. *England v. S & M Foods, Inc.*, 511 So. 2d 1313, 1314 (La. Ct. App. 2d Cir. 1978). See also *Sonnier v. United States Casualty Co.*, 165 So. 2d 3 (La. 1964) (the doctrine of *de minimis* does not exist in Louisiana).

[29] The amicus curiae brief of the Solicitor General says at 13, by way of further example, that unnecessary and wanton infliction of pain – the standard demanded by Prisoner Hudson – will actually meet the Fifth Circuit's significant injury standard in all but the most unusual cases. Lesser injuries, continues the Solicitor General, should be considered "beneath constitutional concern." *Id.* The instant case is one of those "unusual cases." "Significant injury" as the objective component in these types of cases does not present a bright line but does, however, focus the judicial inquiry. The Solicitor General has merely misunderstood the application of the significant-injury requirement in this case, which is that the injuries were minor as a matter of fact and therefore not significant as a matter of law.



The parties thus agree that there is such a thing as a subconstitutional deprivation, and disagree only on where the line is to be drawn.

The test of what is "cruel and unusual," like any test, "should be informed by *objective* factors to the maximum possible extent." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (emphasis added), *quoting Rummel v. Estelle*, 445 U.S. 263 (1980). The lack of an objective standard turns every touching, and every claim of touching, into a constitutional case with no means of resolving the "swearing contest" short of an evaluation of credibility. Every alleged constitutional violation would become a purely factual inquiry without any objective legal standard to guide the inquiry.

Prisoner Hudson proposes that the criterion be pain. That is an unsatisfactory standard first, because it would encompass subconstitutional deprivations which, though not of constitutional import, still cause pain; the distinction between state-law torts and "constitutional torts" would be eliminated. Second, pain is a totally subjective phenomenon. That may be affirmed by a reference to personal-injury litigation, where claims of pain are highly subjective, yielding conflicting opinions from physicians even about the interpretation of such supposedly objective diagnostic devices as thermograms, MRI's, etc.

The objective factor used by the Fifth Circuit provides a workable and fair objective standard to separate state-law torts from "constitutional torts." As This Court observed in *Graham v. Connor*, "the other prongs of the Johnson v. Glick test" – including significant injury – "might be useful in analyzing excessive force claims

brought under the Eighth Amendment." 490 U.S. at 318 n.11 (1989).

Prisoner Hudson's objection to the significant injury standard posits a horrific array of less-than-significant injuries, administered by sinister guards to helpless prisoners. That rests, as does Prisoner Hudson's entire case, on the incorrect premise that the Fifth Circuit's test would leave correctional security officers and other prison personnel free to brutalize prisoners with impunity.[30] The real question is not whether Prisoner Hudson

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[30] For example, the amicus curiae brief of the Solicitor General says at 13 that the Fifth Circuit's test is "a rule that leaves the state 'free to inflict such pains without cause just so long as it is careful to leave no marks.' " Prisoner Hudson urges that This Court retain what can be described as an infliction-of-pain factor for the objective component, rather than significant injury, in a case of this type. One justification that he offers is that all of the states' correctional officials and correctional organizations unanimously condemn the practice of correctional security officers' using unjustified force on prisoners. Therefore, argues Prisoner Hudson in his brief at 18-25, the conduct complained of violates the Eighth Amendment. *See* the amicus curiae briefs of Americans for Effective Law Enforcement, Inc. at 1-7, of Prisoners' Legal Services of New York Amicus Brief at 11-16 & 19-32, and of D.C. Prisoners' Legal Services Project, Inc. at 36-38. *See also* the amicus curiae brief of Human Rights Watch at 4-11 (providing a supposedly international view). That argument – that cruel and unusual punishment is what society says it is – is circular, providing no baseline or constitutional limit. For example, if society through the state legislatures and the American Medical Association determined that incarcerating people for drug addiction was acceptable, then such a punishment could not be prohibited by the Eighth Amendment. *Cf.*, however, *Robinson v. California*,

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has any remedy at all, but whether he is entitled to the third of at least three concurrent and overlapping remedies, when he has voluntarily relinquished two of them and elected to proceed with the third only. Prisoner Hudson's unprotected-inmate objections are answered by looking to those other forms of relief that the law gives to prisoners and to other individuals.

The undisputed evidence at trial shows that there was an administrative remedy for Prisoner Hudson, potentially resulting in discipline or discharge of the offending guards (J.A. 9-10, 13-14, 16-18 & 23). Second, the states typically provide relief under their constitutions[31], their tort laws, and their criminal laws. A state

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370 U.S. 660 (1962). Likewise, if society through state legislatures and the American Correctional Association were to determine that housing prisoners twenty to a cell twenty-four hours a day was good penological practice, then that practice would not be proscribed by the Eighth Amendment. *Cf.*, however, *Rhodes v. Chapman*, 452 U.S. 337 (1981). That type of reasoning is faulty and undesirable, as it strips the Cruel and Unusual Punishment Clause of any real meaning.

The argument put forth in the briefs of Prisoner Hudson and his amici that approving a "significant injury" factor as the objective component in those types of cases would bring a return of the rack, the whipping post, the "Tucker Telephone," and so on, is unfounded and an affront to all correctional personnel in this country. The argument is an emotional plea that amounts to a red herring.

[31] The Louisiana Constitution of 1974, for example, has three sections that might have applied to Prisoner Hudson's allegations: Article I, § 3 ("Right to Individual Dignity"), § 12 ("Freedom from Discrimination"), and § 20 ("Right to Humane Treatment"). In Louisiana, a private right of action for violations of the state constitution exists. *See Moresi v. Dept. of*

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typically allows the tort of battery,[32] a remedy that is available to a state prisoner just as the United States allows federal inmates to file tort actions against the federal government under the Federal Tort Claims Act.

A state's criminal law is another remedy for an inmate.[33] "[N]umerous states have specifically criminalized the unnecessary use of force against prisoners," says Prisoner Hudson's brief at 19. Even in those states

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*Wildlife & Fisheries*, 567 So. 2d 1081, 1093 (La. 1990) (an individual is entitled to money damages for a violation of another section of Article I). At least two decisions of Louisiana courts show claims under the Louisiana Constitution by inmates of Camp J, the very camp in which Prisoner Hudson claims to have been injured. *Armstead v. Phelps*, 449 So. 2d 1049 (La. Ct. App. 1st Cir. 1984), and *Watts v. Phelps*, 377 So. 2d 1317 (La. Ct. App. 1st Cir. 1979), *writ denied*, 380 So. 2d 1210 (La. 1980).

[32] As does Louisiana, for example. See fn. 28 above. Nor would Louisiana's statute of limitations for torts (one year) be a "significant impedimen[t]" for an inmate, as suggested in the amicus curiae brief of Americans for Effective Law Enforcement at 5. The limitations period under § 1983 is borrowed from state law. *See Wilson v. Garcia*, 471 U.S. 261 (1985).

There is no support for the suggestion that states' statutory immunities may be "significant impediments," as argued without citation in the amicus curiae brief of Americans for Effective Law Enforcement. In Louisiana, for example, a defendant would have to show that he did not know the legal standard, *Moresi v. Department of Wildlife & Fisheries*, 567 So. 2d 1081, 1086-87 (La. 1990), an unlikely contention in a battery action.

[33] *See U.S. v. Muniz*, 374 U.S. 150 (1963) (a prisoner may recover damages under the FTCA for personal injuries).



that have not "specifically" criminalized such force, criminal statutes proscribe assault and battery.[34]

There is absolutely no support for the "belie[f]" that "the threat of civil suit in state courts is often an inadequate deterrent to officer misconduct," as stated in the amicus curiae brief of Americans for Effective Law Enforcement at 5. The supposed reluctance of elected judges to penalize local prison officers, *id.*, is a sweeping and obviously unsupportable aspersion on the integrity and impartiality of hundreds of judges (and juries) throughout the country, as is the notion that federal courts are impartial and state courts are not, as implied in *id.* at 3. Such implications are offensive to federalism and simply elitist.

Of the remedies listed above, there is no evidence that Prisoner Hudson was unaware of them, no evidence that he could not have used them, and no evidence that he made any attempt to use them: the only conclusion is that he intentionally waived those remedies. They are adequate in every respect except perhaps that § 1983 allows relief that is often more generous than that allowed by the States[35] – in other words, a potential for

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[34] See, for example, Louisiana Revised Statutes 14:33-38 (assault and battery) and 41-43.5 (rape and sexual battery). *See also* Prisoner Hudson's brief at 21 n. 7, which cites other states which provide protections to prisoners against unnecessary force.

[35] Louisiana, for example, does not permit an award of attorney's fees where not permitted by statute or contract, *Austin v. Parker*, 672 F.2d 508, 518 (5th Cir. 1982), and does not permit an award of punitive damages where not expressly

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getting more money, hardly a fit constitutional consideration. The CSO's Jack McMillian, Marvin Woods, and Lt. Mezo do not suggest that the availability of constitutional remedies should necessarily depend on the availability of state-law remedies, only that This Court should discount the emotional implication of Prisoner Hudson and his amici that the only shield between a prisoner and unlimited brutality is the Eighth Amendment.

The Fifth Circuit was correct in its dismissal of Prisoner Hudson's Eighth Amendment claim that CSO's McMillian and Woods and Lt. Mezo used unauthorized physical force on him in an isolated incident that did not cause Prisoner Hudson to suffer significant injury. The constitutional inquiry, however, need not stop here. Prisoner Hudson may have had a claim under the Due Process Clause of the Fourteenth Amendment.

## III. PRISONER HUDSON DOES NOT HAVE AN EIGHTH AMENDMENT CLAIM, BUT MAY HAVE HAD A FOURTEENTH AMENDMENT DUE PROCESS CLAIM

In this case the allegation is made by a state prisoner that two state correctional officers used excessive and unnecessary physical force on him while another state

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authorized by statute, *International Harvester Credit Corp. v. Searle*, 518 So. 2d 1039, 1041 (La. 1988). Of course, even if Prisoner Hudson is not entitled to Eighth Amendment relief, he might have been entitled to Fourteenth Amendment substantive due-process relief (including all of the monetary advantages of a § 1983 action), had he elected to sue for it.



correctional officer stood by and watched. In such a case the substantive constitutional right at stake is the Cruel and Unusual Punishment Clause of the Eighth Amendment. *See Whitley v. Albers*, 475 U.S. at 318-26. *See also Graham v. Connor*, 490 U.S. at 394. This Court has recently stated that the Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishment" on those convicted of crimes. *Wilson v. Seiter*, 111 S.Ct. at 2323. The Fourteenth Amendment's Due Process Clause requires that the several states afford due process of law before depriving individuals of rights secured elsewhere in the Constitution.[36]

Prisoner Hudson's claim is not one that arises under the Eighth Amendment's Cruel and Unusual Punishment Clause because unauthorized isolated acts by prison personnel, in violation of prison policy and for essentially personal rather than penal reasons, do not rise to the

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[36] While negligent deprivations by prison personnel are not cognizable under the Due Process Clause of the Fourteenth Amendment, *see Daniels v. Williams*, 474 U.S. 327 (1986), *Davidson v. Cannon*, 474 U.S. 344 (1986), and *Parratt v. Taylor*, 451 U.S. 527, 541 (1981), intentional deprivations may be. *Hudson v. Palmer*, 468 U.S. 517, 531 (1984) (property). *See also Daniels v. Williams*, 474 U.S. at 334 n.3, and *Davidson v. Cannon*, 474 U.S. at 346-48 (as to personal injury no determination on intentional denials). Intentional deprivations do not rise to a level of constitutional import under the Due Process Clause unless the State refuses to or does not provide an adequate remedy. *Hudson v. Palmer*, 468 U.S. at 531, and *Parratt v. Taylor*, 451 U.S. at 541. That has been the case since *Ingraham v. Wright*, 430 U.S. 651, 673-83 (1977). An intentional deprivation does not violate the Due Process Clause until the prisoner has given the State the opportunity to provide him with all the process that he is due.

level of punishment within the meaning of the Eighth Amendment. *See George v. Evans*, 633 F.2d at 415, and *Johnson v. Glick*, 481 F.2d at 1032. Such actions by prison personnel that cause injury to a prisoner, however, may rise to the level of a deprivation of a substantive due process right under the Fourteenth Amendment. *See Daniels v. Williams*, 474 U.S. 327, 333-34 (1986), and *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986). Under the Due Process Clause, however, if the State provides pre-deprivation restrictions and post-deprivation remedies for use of force, a violation of due process under the Fourteenth Amendment has not occurred. See *Ingraham v. Wright*, 430 U.S. at 672-82.

The conduct complained of by Prisoner Hudson is prohibited by prison rules and regulations, as well as by Louisiana's Constitution and other laws.[37] The State of Louisiana also provides to Prisoner Hudson and to all other prisoners adequate post-deprivation remedies to redress the conduct complained of as well as other types of unauthorized conduct by prisoner personnel.[38]

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[37] See fn. 28, 31 & 34 above, and fn. 38 below.

[38] In Louisiana, prison employees can be subjected to disciplinary action for engaging in the type of conduct complained of by Prisoner Hudson (J.A. 23; Tr. 90 & 95-96). It is also clear that Louisiana state courts are open to prisoners for the purpose of suing prison personnel who have caused them unjustified wrongs. For example, *see Parker v. State*, 282 So. 2d 483, 486-87 (La. 1973), *cert. denied*, 414 U.S. 1093 (1973); *Anderson v. Phelps*, 451 So. 2d 1284, 1285 (La. Ct. App. 1st Cir. 1984); *McGee v. State*, 417 So. 2d 416, 418 (La. Ct. App. 1st Cir.), *writ denied*, 420 So. 2d 871 (La. 1982); *Neathery v. State*, 395 So. 2d

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Therefore, while a prisoner might have a claim under the Due Process Clause in federal court under the same facts as asserted by Prisoner Hudson if the State did not provide pre-deprivation prohibitions and guidelines and post-deprivation remedies, Prisoner Hudson did not have a claim under the Due Process Clause because the State of Louisiana provides both pre-deprivation prohibitions and post-deprivation remedies.[39]

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407, 410 (La. Ct. App. 3d Cir. 1981); *Shields v. State Through Dep't of Corrections*, 380 So. 2d 123 (La. Ct. App. 1st Cir. 1979), *writ denied*, 382 So. 2d 164; *Craft v. State*, 308 So. 2d 290, 295 (La. Ct. App. 1st Cir.), *writ denied*, 319 So. 2d 441 (La. 1975), *cert. denied*, 423 U.S. 1075, 96 S.Ct. 859, 47 L.Ed.2d 84 (1975); *Lewis v. Listi*, 377 So. 2d 551, 553 (La. Ct. App. 3d Cir. 1979); *Bastida v. State*, 269 So. 2d 544, 545 (La. Ct. App. 1st Cir. 1972); *Adams v. State*, 247 So. 2d 149, 151 (La. Ct. App. 1st Cir. 1971); *St. Julian v. State*, 98 So. 2d 284 (La. Ct. App. 1st Cir. 1957); *Nedd v. State*, 281 So. 2d 131, 132 (La. 1973), *cert. denied*, 415 U.S. 957, 94 S.Ct. 1484, 39 L.Ed.2d 572 (1974); *Mack v. State*, 529 So. 2d 446, 448 (La. Ct. App. 1st Cir. 1988), *writ denied*, 533 So. 2d 359 (La. 1988); *Walden v. State*, 430 So. 2d 1224 (La. Ct. App. 1st Cir. 1983), *writ denied*, 435 So. 2d 430 (La. 1983); *White v. Phelps*, 387 So. 2d 1188 (La. Ct. App. 1st Cir. 1980); *Hampton v. State*, 361 So. 2d 257, 258 (La. Ct. App. 1st Cir. 1978); *Davis v. State*, 356 So. 2d 452, 454 (La. Ct. App. 1st Cir. 1977); *Betsch v. State*, 353 So. 2d 385, 359 (La. Ct. App. 1st Cir. 1977), *writ refused*, 354 So. 2d 1389 (La. 1978); *Williams v. State*, 351 So. 2d 1273 (La. Ct. App. 1st Cir. 1977); *Jones v. State*, 346 So. 2d 807, 808 (La. Ct. App. 1st Cir.), *writ refused*, 350 So. 2d 671 (La. 1977); *Walker v. State*, 346 So. 2d 794, 796 (La. Ct. App. 1st Cir.), *writ denied*, 349 So. 2d 879 (La. 1977); *Raney v. State*, 322 So. 2d 890 (La. Ct. App. 1st Cir. 1975); and *Bay v. Maggio*, 417 So. 2d 1386 (La. Ct. App. 1st Cir. 1982).

[39] The conduct complained of by Prisoner Hudson was against prison policy and state law. The conduct complained of

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## IV. CONCLUSION

For the above reasons, CSO's McMillian and Woods and Lt. Mezo urge this Court to affirm the holding in the opinion of the Fifth Circuit.

WILLIAM J. GUSTE, JR.
Attorney General For The State Of Louisiana

HARRY MCCALL, JR.
JONATHAN C. MCCALL
Special Assistant
Attorneys General
CHAFFE, MCCALL, PHILLIPS
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana
70163-2300
(504) 585-7000

JENIFER SCHAYE
CLIFTON O. BINGHAM, JR.
HOUSTON C. GASCON, III
JOSEPH ERWIN KOPSA*
Assistant Attorneys
General
Department of Justice
Division of Risk Litigation
Post Office Box 94095
626 N. 4th Street, 6th Floor
Baton Rouge, Louisiana
70804-9095
(504) 342-8495

*COUNSEL FOR RESPONDENTS*

*Counsel of Record

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was therefore a random unauthorized act. The post-deprivation prohibitions and guidelines established by Louisiana and high prison officials at LSP did not prevent the alleged conduct by CSO's McMillian and Woods and Lt. Mezo. Because Louisiana provides post-deprivation remedies Prisoner Hudson must resort to the State post-deprivation remedies prior to his suing under the Due Process Clause of the Fourteenth Amendment. See *Hudson v. Palmer*, 468 U.S. 517, 532-34 (1984); *Parratt v. Taylor*, 451 U.S. 527, 541 (1981); *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986); and *Davidson v. Cannon*, 474 U.S. 344, 346-48 (1986). This has been the case since *Ingraham v. Wright*, 430 U.S. 651, 673-83 (1977). Prisoner Hudson has not been denied due process of law, but rather has ignored the process that he was due.